

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Douglas A. Kelley, in his	)	File No. 19-cv-1756
capacity as the Trustee of the	)	(WMW)
BMO Litigation Trust,	)	
	)	
Plaintiff,	)	St. Paul, Minnesota
	)	October 20, 2022
vs.	)	8:31 a.m.
	)	
BMO Harris Bank N.A., as	)	
successor to M&I Marshall and	)	
Ilsley Bank,	)	
	)	
Defendant.	)	

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BEFORE THE HONORABLE WILHELMINA M. WRIGHT  
UNITED STATES DISTRICT COURT JUDGE

**(JURY TRIAL PROCEEDINGS - VOLUME VII)**

Proceedings reported by certified court reporter;  
transcript produced with computer.

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**P R O C E E D I N G S**

**IN OPEN COURT**

**(JURY NOT PRESENT)**

THE CLERK: The case before the Court is  
19-cv-1756, Kelley vs. BMO Harris.

Counsel, please stand and note your appearances  
for the record.

MR. MARDER: Good morning, Your Honor. David  
Marder appearing for the plaintiff.

THE COURT: Thank you. Good morning.

MR. GLEESON: Good morning, Your Honor. John  
Gleeson for BMO Harris Bank.

THE COURT: Thank you.

Are there matters that we need to address before  
the jury comes in?

MR. ANTHONY: I think, Your Honor, yesterday you  
raised the question at the close of the day about a juror  
who had provided you some information to the effect that she  
had gone to high school and knew one of the major witnesses  
in this case, Mr. Flynn. I think we're waiting for either  
your decision on that or whether you are going to entertain  
argument on that and how you would like to proceed.

THE COURT: Okay. I would like to hear the  
parties' views, if they wish to --

MR. ANTHONY: I would be glad to share them with

1       you, Your Honor. Joe Anthony for the plaintiff.

2               THE COURT: Thank you. And if you would like,  
3       Mr. Anthony, you may come to the podium.

4               MR. ANTHONY: I'm going to come to the podium.  
5               May it please the Court. Joe Anthony for the  
6       plaintiff.

7               THE COURT: Yes.

8               MR. ANTHONY: Judge, I don't think I have ever  
9       seen a case in this jurisdiction where unfortunately we have  
10      a juror who knows a major witness in the case, went to high  
11      school with them, now recognizes them during the midst of  
12      the testimony here.

13              I don't need -- even need the name of the juror to  
14      know what our view of that is. We have 12 jurors in the  
15      box. As everybody in this courtroom knows, in Minnesota,  
16      you can have as few as six jurors. So excusing this juror  
17      would still leave us with 11 and with plenty of room for the  
18      remaining week or two for this trial.

19              I think that if this witness had recognized or if  
20      the -- if the juror had recognized one another or the juror  
21      had recognized the name, it would have been revealed, and I  
22      think she would have been excused for cause or she certainly  
23      would have been stricken.

24              The Court is mindful of all the other jurors who  
25      were excused for cause, for example, because they had a

1 problem with their bank or they had some concerns. And I  
2 think the Court was very fair in the way you went about  
3 excusing those jurors, and it's our hope and expectation  
4 that the Court will view this juror in a similar fashion.

5 You know, just questioning her, I think, even  
6 having her come in to be questioned would revive her  
7 recollections of her experience with the witness, which  
8 would make it even more problematic for her to serve.

9 One of the biggest risks is her participation  
10 could taint the entire jury panel, and we'd have no way of  
11 knowing that or measuring it. All she has to say in  
12 deliberations or as an aside is that she went to high school  
13 with the witness, Mr. Flynn, and share some view, good or  
14 bad. By the way, whether it's good or bad, it's just going  
15 to taint the pool. Maybe she didn't like him, and that  
16 might favor one side. Then the other, maybe she was friends  
17 with him or he was, you know, the king of the prom or  
18 something. Who knows?

19 But, in any event, her recollections have the risk  
20 of tainting the entire jury; and, for that reason, and  
21 because there's no way to impact -- or evaluate that impact,  
22 we think it's -- the only fair thing is that whoever the  
23 juror is, that the juror be excused.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Anthony.

1 MR. GLEESON: Good morning, Judge.

2 THE COURT: Good morning.

3 MR. GLEESON: Mr. Anthony is right. Like who  
4 knows? It does seem like an attenuated connection. Mr. --  
5 we're trying to figure out when Mr. Flynn left high school.  
6 We think it's 37 years ago. It's a long time.

7 And I think actually if this had come up during  
8 the voir dire, you would have asked this juror whether  
9 there's anything about the Chris Flynn that she remembered  
10 that would affect her ability to be fair. And my suggestion  
11 is let's fill in that gap of who knows and just ask her  
12 whether or not she can be fair.

13 We selected her. She was part of a panel.  
14 There's a right on the part of both sides not to have a  
15 jury -- juror excused unless there's some good reason once  
16 the person is on the panel.

17 Here's my suggestion, Judge. This is kind of  
18 intimidating. It can be. My suggestion is you invite her  
19 into chambers, have the court reporter. We can watch the  
20 live feed. You can probe her what the nature of her  
21 relationship was then and ask her whether or not there's  
22 anything about her recollections or relationship, if there  
23 was one, with or about Chris Flynn that would prevent her  
24 from rendering a verdict based solely on the evidence in the  
25 case.

1 I think that would promote candor. This can be a  
2 little intimidating. And we can watch the feed. And then  
3 the Court can listen to argument, if it wishes to. And to  
4 the degree that this juror can't be fair, she could be  
5 excused. That's my suggestion -- that's our suggestion.

6 Thank you.

7 MR. ANTHONY: Back in the 15th and 16th centuries  
8 when they started jury trials, it used to be your neighbors  
9 who would sit in judgment of you. We don't do that anymore.  
10 We don't allow jurors to serve who know major witnesses.  
11 It's really not more complicated than that.

12 And I think that one of the reasons why we do voir  
13 dire and why you do voir dire in front of the public and in  
14 front of the lawyers is so that everybody can evaluate  
15 face-to-face what the juror is saying.

16 Yes, it is intimidating, but in addition to  
17 anybody from here watching it, you asking questions  
18 raises -- revives the recollections of the juror, which is  
19 the last thing we should be trying to do.

20 We should be figuring out whether, for example,  
21 she would have been stricken, which she would have been if  
22 she said she knew one of the witnesses. We wouldn't have  
23 inquired then if she could have been fair or what she knew  
24 about the witness. She wouldn't have been allowed in open  
25 court in front of all the other jurors to say how she knew



1 the witness and whether they went to high school and could  
2 she be fair and did she know anything. We would have never  
3 done that. She would have been gone.

4 And for that reason, Your Honor, I think the only  
5 fair thing to do is to excuse this juror and allow the other  
6 11 to sit in judgment.

7 Thank you, Your Honor.

8 (Pause)

9 THE COURT: I'll take a brief recess and then be  
10 back with my decision.

11 (Recess taken at 8:39 a.m.)

12 \* \* \* \* \*

13 (8:47 a.m.)

14 **IN OPEN COURT**

15 **(JURY NOT PRESENT)**

16 THE COURT: We are going to have the juror come  
17 in, and I will ask her questions -- you may be seated -- I  
18 will ask her questions about what she's disclosed and make a  
19 decision after that.

20 (Pause)

21 (Juror 26 brought into courtroom)

22 THE COURT: Take your seat in your normal seat.

23 (The Court and law clerk confer)

24 THE COURT: You may be seated. Good morning.

25 So, Juror Number 26, good morning.

1 JUROR 26: Good morning.

2 THE COURT: And I understand that it has come to  
3 your attention that you recognize one of the people who is  
4 involved in this case. Who is that person?

5 JUROR 26: Christopher Flynn.

6 THE COURT: Okay. I am going to ask you to speak  
7 up just so that everyone in the courtroom can hear you. You  
8 said Christopher Flynn?

9 JUROR 26: Christopher Flynn, yes.

10 THE COURT: And how do you know Mr. Flynn?

11 JUROR 26: I went to high school with him.

12 THE COURT: Okay. Have you been in touch with  
13 Mr. Flynn since high school?

14 JUROR 26: No. Possibly a reunion along the way,  
15 but nothing that I can exactly pinpoint.

16 THE COURT: Okay. Have you told the other jurors  
17 that you know this person or recognize this person?

18 JUROR 26: I have not told anyone.

19 THE COURT: Okay. Thank you. And would the fact  
20 that you recognized this person have any effect on your  
21 ability to be a fair and impartial juror?

22 JUROR 26: I've kind of been asking myself that,  
23 and it's a very difficult question to answer. Truthfully,  
24 that's my answer. I can't say yes or no --

25 THE COURT: Okay.

1 JUROR 26: -- and be positively honest.

2 THE COURT: Okay. Thank you. Thank you for your  
3 candor.

4 Does counsel have any questions that they would  
5 like me to ask?

6 MR. ANTHONY: No questions, Your Honor, at this  
7 point.

8 THE COURT: Okay. Thank you.

9 MR. GLEESON: Agreed.

10 THE COURT: All right. Thank you. I will excuse  
11 you for now. Thank you very much for coming in, and thank  
12 you for bringing this to our attention.

13 (Juror 26 excused from the courtroom)

14 THE COURT: Counsel, do you wish to be heard?

15 MR. ANTHONY: Mr. Gleeson and I have agreed, if  
16 the Court agrees, that the witness -- the juror should be  
17 excused.

18 THE COURT: And I do agree. So we will excuse  
19 this juror.

20 MR. ANTHONY: Thank you, Your Honor.

21 THE COURT: You're welcome. And thank you,  
22 Counsel.

23 MR. ANTHONY: I will say I didn't want to ask the  
24 juror -- I'm sure we both had questions we would have asked,  
25 but I think it was so clear that we wanted to respect the

1 juror by not putting her through anything.

2 THE COURT: Okay. I guess -- I think that's  
3 right. So we will proceed. I will notify the juror that  
4 she is excused. Do the parties wish to have that done in  
5 open court or are you satisfied with me doing so privately?

6 MR. GLEESON: My suggestion, Judge, is you let the  
7 rest of the jurors know that she's been excused with the  
8 thanks of the Court, and we can just -- I don't think we  
9 should do anything more than that.

10 MR. ANTHONY: I agree.

11 THE COURT: Okay.

12 (Recess taken at 8:54 a.m.)

13 \* \* \* \* \*

14 (8:59 a.m.)

15 **IN OPEN COURT**

16 **(JURY PRESENT)**

17 THE COURT: Good morning. Please be seated.

18 And we are ready to proceed. I will announce that  
19 Juror Number 26 is excused. Are we ready to go?

20 Good morning.

21 THE WITNESS: Good morning.

22 THE COURT: And you may proceed, Counsel.

23 MR. MOHEBAN: Thank you, Your Honor.  
24  
25

Flynn - Direct

(Christopher Flynn)

**DIRECT EXAMINATION** (Continued)

BY MR. MOHEBAN:

Q. Good morning, Mr. Flynn.

A. Good morning.

Q. I want to start off this morning sort of at the end. I want to have you tell us, how did you find out about the Petters Ponzi scheme?

A. I was in a meeting first thing in the morning near by my office, and as I was coming out of this meeting, I got a call from our office and they indicated there were some members of law enforcement that were here to see me about one of our clients.

So I went to the office. I greeted the three individuals that were there, and they proceeded to tell me that they were going to be asking for information about one of our clients.

Q. These individuals, the three individuals, did they identify where they were from?

A. They did. I don't exactly remember, but I remember possibly the FBI, the IRS, and the postal inspector.

Q. And was there a point in time where they informed you which of your customers they wanted information about?

A. Yes.

Q. And who was that?

Flynn - Direct

1 A. Tom Petters.

2 Q. Okay. Did they ask you to provide them documents and  
3 information?

4 A. Yes, they did.

5 Q. Did you comply with that request?

6 A. I consulted legal counsel and was told that let them  
7 know we would be happy to comply if presented with a  
8 subpoena.

9 Q. And did you at some point receive a subpoena from law  
10 enforcement for records of the Petters Company?

11 A. Yes.

12 Q. And then did you assist in complying with that request?

13 A. Yes.

14 Q. So that's 14 years ago, right?

15 A. Yes.

16 Q. And you're still telling people what you know about the  
17 Petters account today, right?

18 A. Yes.

19 Q. In that intervening time, from 2008 to now, have you  
20 been called on by law enforcement to testify?

21 A. Yes.

22 Q. When did that occur?

23 A. I don't remember the exact dates, but at one point I was  
24 asked to be a possible witness for the trial of Frank  
25 Vennes.

1 Q. Okay. Are there other times when you've been asked to  
2 provide assistance or cooperation with law enforcement?

3 A. Yes.

4 Q. Can you describe those.

5 A. At one point there was -- if this was law enforcement, I  
6 believe it was, I'm not exactly sure, but at one point we  
7 were asked to meet with some forensic accountants to provide  
8 information.

9 Q. Okay. So the plaintiff in this case is Doug Kelley.

10 Was there ever a point in time when you were asked to  
11 provide cooperation and assistance to him?

12 A. I remember reaching out to Mr. Kelley shortly after  
13 Mr. Petters had been arrested and they had been -- he had  
14 been appointed the receiver. And, you know, one, we just  
15 wanted to understand who he was and see what he needed in  
16 his capacity as receiver; and, you know, basically at that  
17 point there was nobody who was an active signer on the  
18 account other than at that point the receiver. So I believe  
19 we had to give him some signing authority over the checking  
20 account.

21 Q. So was there a point in time where Mr. Kelley took  
22 control of the PCI accounts at M&I Bank?

23 A. I believe so, yes.

24 Q. Could we look at Exhibit P-2-144. We will blow up the  
25 Call Report part.

Flynn - Direct

1 Okay. That's good.

2 Is this a Call Report that you prepared in the  
3 MIContacts database?

4 A. Yes, it appears to be.

5 Q. There's a place where it says, "Reporting Person," and  
6 that's got your name next to it?

7 A. Yes, that's correct.

8 Q. And can you tell us the date of the meeting or contact.

9 A. I entered this on December 11th, 2008.

10 Q. And the time frame when law enforcement came to see you  
11 to get information about Petters, when was that?

12 A. I believe it was sometime in September of that year.

13 Q. Okay. So we're now about three months later; is that a  
14 fair statement?

15 A. That sounds about right, yeah.

16 Q. And your log says, "Doug has been appointed receiver for  
17 Petters assets." Do you recall where you got the source of  
18 that information?

19 A. I don't specifically recall, no.

20 Q. It says, "We have been in contact on a few matters. He  
21 needed to be set up on new signature cards for the accounts,  
22 et cetera." Do you see that?

23 A. Yes, I do.

24 Q. Okay. After that point in time, did you have continued  
25 contact with Mr. Kelley regarding his control of the PCI



1 accounts at M&I Bank?

2 A. I don't specifically recall if we did.

3 Q. Okay. You mentioned meeting with forensic accountants.  
4 Were those forensic accountants meeting with you at the  
5 request of Mr. Kelley?

6 A. I don't recall specifically if that was the case.

7 Q. Do you know how much time you spent assisting the  
8 forensic accountants?

9 A. I don't. My knowledge on that is a little bit foggy  
10 after all these years, but it seemed to be a better part of  
11 a day.

12 Q. Fair enough.

13 I now want to turn to these -- yesterday you were  
14 asked a number of questions about these Deposit Account  
15 Control Agreements. Do you remember that testimony?

16 A. Yes, I do.

17 Q. And I would like to put up Plaintiff's Exhibit 20 for  
18 that purpose. It's an e-mail chain, and I think we need to  
19 go to the last page and we're going to work forward on this.

20 MR. MOHEBAN: So, yes, that's good right there.

21 BY MR. MOHEBAN:

22 Q. So the first part of this e-mail chain is an e-mail from  
23 Deanna Coleman to you on February 8th of 2008, correct?

24 A. Yes.

25 Q. Okay. And you looked at this yesterday, and I think it

1 was established that there was a copy of a Deposit Control  
2 Agreement attached to her e-mail; is that right?

3 A. That's what I recall, yes.

4 Q. Was it your idea to do a Deposit Control Agreement with  
5 the Petters companies?

6 A. No.

7 Q. So this came to you as a request from the customer?

8 A. That's correct.

9 Q. So then if we go to the next part of this e-mail, so you  
10 get the request and then the same day you are sending an  
11 e-mail to Carolyn Moline and Jane Schwede at M&I, correct?

12 A. Yes.

13 Q. Now, yesterday when we looked at this e-mail, Mr. Marder  
14 focused on the language "special handling." Do you see that  
15 there?

16 A. I do.

17 Q. And then he took you to the AML training slides. Do you  
18 remember doing that?

19 A. Yes.

20 Q. I would like to go to that slide now. I think it's  
21 PX-5-34. And then we are going to come back to this.

22 So this is the part of the AML training that you  
23 talked about yesterday, correct?

24 A. Yes.

25 Q. And would you read the third bullet point. That is what

1 we were discussing, right?

2 A. Out loud?

3 Q. Just to yourself.

4 A. Okay.

5 Q. So when it says, "A customer" -- so it's a red flag. It  
6 says here, "A customer who requests special treatment or  
7 'exceptions' to the documentation rules," right?

8 A. Yes.

9 Q. So in the context of these Deposit Account Agreements,  
10 did anyone ever request that there be some exception to  
11 documentation rules?

12 A. Not that I recall.

13 Q. And, in fact, the agreement that ultimately was reached  
14 for these three hedge funds, Ritchie and Palm Beach and  
15 Interlachen, they were documented and signed contracts; is  
16 that true?

17 A. Yes.

18 Q. Let's go back now to Plaintiff's Exhibit 20. Why were  
19 you sending the agreement or draft agreement to these two  
20 individuals?

21 A. I don't know if I recall specifically, but Carolyn -- in  
22 our -- the way our job duties are segmented, someone in my  
23 role wouldn't physically open accounts, close accounts,  
24 things of that nature. That would fall upon our  
25 administrative staff to actually physically open an account.

1 And Carolyn oversaw that team, so I wanted her to be aware  
2 of it.

3 And, again, as I mentioned yesterday, I don't  
4 specifically remember Jane's role in this, so I can't really  
5 comment on why I sent it to Jane, but for some reason I felt  
6 like -- I thought she should be in the loop.

7 Q. Did you think that Carolyn Moline at the bank would be  
8 involved in implementing this agreement if it was to go into  
9 effect?

10 A. I believe so, yes.

11 Q. So was contacting Ms. Moline part of your attempt to  
12 determine how you could actually implement the agreement?

13 A. Yes.

14 Q. And you say in the second paragraph, "I have reviewed  
15 the agreement." Is that true?

16 A. Yes.

17 Q. So at the time you got the agreement, you actually read  
18 through it?

19 A. Yes, I did.

20 Q. You're not an attorney, correct?

21 A. That's correct.

22 Q. But you did read it to the best you could understand it?

23 A. Yes.

24 Q. Okay. And then you asked them to review it as well; is  
25 that right?

1 A. Yes, I did.

2 Q. So the same day you got this request from your client or  
3 your customer, three people at the bank are reviewing or  
4 being asked to review the document; is that correct?

5 A. Yes, I asked them to review the document, that's  
6 correct.

7 Q. Let's work up, then, to the next e-mail I think at the  
8 very --

9 MR. MOHEBAN: Okay. That's good.

10 BY MR. MOHEBAN:

11 Q. Now, this is a responsive e-mail from Ms. Moline to you,  
12 and she says in the first line, "I had asked Peggy Franzen  
13 what her experience has been in the past with Control  
14 Agreements." So am I right that Ms. Moline brought yet a  
15 fourth person from the bank into this review of the  
16 agreement?

17 A. Yes.

18 Q. Do you recall who Peggy Franzen was?

19 A. She had a role in overseeing some of the depository  
20 services that clients might utilize.

21 Q. It goes on to say, "The information that she had is if  
22 the customer is to use Treasury Management projects [sic],  
23 especially they have worked with Godfrey and Kahn law firm  
24 to review." And when you talk about "treasury management  
25 products," can you tell us what's being referred to there.

1 A. Sure. Treasury management sort of encompasses a variety  
2 of depository services that a client might use; online  
3 banking access, the ability to send ACH, fraud protection  
4 items, positive pay, things like that.

5 COURT REPORTER: I'm sorry. Deposit to pay?

6 THE WITNESS: Positive pay.

7 COURT REPORTER: Positive pay. Thank you.

8 THE WITNESS: When a client is evaluating what  
9 their needs are and sort of overseeing their deposit  
10 accounts, they would be working with a treasury management  
11 specialist.

12 BY MR. MOHEBAN:

13 Q. Was one of the things you considered in response to  
14 Ms. Coleman's request that maybe there was a treasury  
15 management product that could meet their needs here?

16 A. I don't specifically remember that.

17 Q. Ms. Moline also refers to in the next sentence that  
18 Peggy Franzen had a Control Agreement that was approved for  
19 the bank. Do you see that?

20 A. Yes.

21 Q. So there was at least one prior instance where the bank  
22 had done a Deposit Control Agreement; is that a fair  
23 statement?

24 A. It appears to be, yes.

25 Q. Okay. And then she raises some questions. How are we

1 going to get compensated? Do they want an actual lockbox?  
2 Do you recall conveying those questions back to your  
3 customer?

4 A. I remember sending an e-mail about the agreement itself.  
5 I don't know if I recall, you know, looking at specific  
6 depository services for what they were asking with the  
7 agreement that they had sent to me.

8 Q. Okay. Ms. Moline, if we go down a couple paragraphs,  
9 has a sentence, "So I would be concerned that we have the  
10 staff or knowledge to take care of this." Do you see where  
11 that is?

12 A. I do.

13 Q. So was one of your objectives in getting all these  
14 people involved in looking at this agreement was that you  
15 could make sure that you could actually carry out whatever  
16 obligations the bank would have?

17 A. Yes.

18 Q. And then she raises in her last sentence the idea that,  
19 "There's a new person in trust who I might run this by."  
20 Did the bank have a trust department?

21 A. I recall that they did, yes.

22 Q. And did you, on occasion, refer things or have the trust  
23 department at the bank provide services for your customers?

24 A. Yes.

25 Q. And what's your basic understanding about what the trust

1 department of the bank could do?

2 A. It could be a variety of things, but one might be to  
3 function as, you know, an intermediary or someone that has  
4 some additional oversight into accounts.

5 Q. Do you have accounts at the bank -- at M&I at that time  
6 which are called trust accounts?

7 A. I believe so, yes.

8 Q. And in a trust account, would someone be a trustee and  
9 then have some authority over that account?

10 A. Yes.

11 Q. Did you evaluate that as a potential way to meet  
12 Ms. Coleman's objectives?

13 A. Yes. I believe we did, yes.

14 Q. Let's see if we have any more of this e-mail. I think  
15 that covers all of Exhibit 20.

16 Let's go then to Exhibit 21, Plaintiff's Exhibit  
17 21. If we go to the beginning of this, again, we have to  
18 start at the bottom. If we go to the beginning, we start  
19 with that same e-mail from Ms. Coleman and your e-mail to  
20 Ms. Moline and Ms. Schwede. And if we go to the next  
21 page -- sorry, I know am challenging you back there. One  
22 page before that.

23 Now you are getting -- in this e-mail, you get  
24 some feedback from Ms. Schwede. This is also the same day,  
25 February 14th, right?



1 A. Yes.

2 Q. Okay. She says, "I do not like 2C." Was that a  
3 reference to a paragraph of the draft agreement?

4 A. Yes, it was.

5 Q. And then she says, "I do not think M&I wants to be  
6 responsible for reconciling an account and transferring  
7 funds out. The client should reconcile and transfer the  
8 funds. M&I doesn't want any responsibility in this area."  
9 So that's the feedback you got from Ms. Schwede?

10 A. Yes.

11 Q. If we go farther up, Ms. Moline poises the question:  
12 "Is there a rule of thumb on who should be reviewing these?  
13 DO we want our legal to look at this?" Do you see that?

14 A. I do.

15 Q. So was there a point in time when you asked your legal  
16 department to help in evaluating this request from  
17 Ms. Coleman?

18 A. I remember reaching out to my supervisor at the time,  
19 and she advised me to engage legal counsel familiar to the  
20 bank to review and provide an opinion on the document.

21 Q. And did you do that?

22 A. Yes.

23 Q. Okay. Let's look at Plaintiff's Exhibit 23. We can  
24 make that a little bit bigger.

25 So you received the request from Ms. Coleman on

February 14th, and so now four days later, you are responding to see chowse@howselaw.com, right?

A. Yes.

Q. And you indicate in the first line his name is Craig?

A. Yes.

Q. Okay. And you testified yesterday your understanding was that he was the lawyer for the hedge fund that would be the protected party under this agreement?

A. Yes.

Q. That was your understanding at that point in time?

A. Yes.

Q. Mr. Marder yesterday brought up the name of Frank Vennes and suggested to you that Mr. Howse had been a lawyer for Mr. Vennes. Do you remember those questions?

A. I do.

Q. Is there any reference in this e-mail to Frank Vennes being involved with this transaction?

A. Not that I can see, no.

Q. Now, in the first paragraph of your e-mail to Mr. Howse, you're saying, "I have asked Kevin Busch at the firm of Moss & Barnett to review the agreement." So is that the outside counsel that you just mentioned that you had a relationship with?

A. Yes.

Q. So from time to time would you send questions, legal

1 questions, to Mr. Busch for advice?

2 A. Yes.

3 Q. So you asked him to review the agreement, and then  
4 you're sharing with Mr. Howse some of the feedback that you  
5 got from your attorney; is that right?

6 A. Yes.

7 Q. And then you tell him on that same day you plan to be  
8 visiting with Kevin, your attorney, and then you'll give him  
9 further feedback and Deanna Coleman once you've talked to  
10 your attorney, correct?

11 A. Yes.

12 Q. Okay. If we go further down this e-mail, you make a  
13 statement of your intention with respect to this agreement.  
14 You say, "We approach this request in the spirit of trying  
15 to help accommodate our customer and your client, along with  
16 the other protected parties, with the assurances you need to  
17 feel comfortable with the working of the purchase order  
18 financing in which they are engaged. We just want to make  
19 sure the agreement provides the proper level of durability  
20 so it can be properly managed by our organization in a way  
21 which represents a fair arrangement for all."

22 Is that an accurate statement of your intent at  
23 the time?

24 A. Yes.

25 Q. Was it your intent to actually find some mechanism to

1 provide Mr. Howse and Ms. Petters -- or Ms. Coleman the  
2 assistance that they wanted?

3 A. Yes.

4 Q. Okay. Let's now go to Plaintiff's Exhibit 22. So this  
5 is the following day, and now -- yesterday -- or the prior  
6 day your e-mail was just to Mr. Howse, right?

7 A. Yes.

8 Q. And today you're sending what's called the "Bank  
9 response to Deposit Control Agreement" to both Ms. Coleman  
10 and Mr. Howse, right?

11 A. Yes.

12 Q. And now you're recounting to them the advice that you  
13 got from Mr. Busch?

14 A. Yes.

15 Q. Now, in the first paragraph, to summarize, and tell me  
16 if I summarized this right, you're addressing issues that  
17 the bank has about being protected from liability? You can  
18 read that to yourself.

19 (Witness reviews document)

20 Q. You're raising -- was it your concern that the bank  
21 could be put in the middle of some dispute between Petters  
22 and one of the hedge funds?

23 A. Well, I'm not an attorney, but, you know, on the advice  
24 of the attorney I consulted, these were items that he  
25 indicated that would make it -- the document that was sent

1 to us to review, that it wouldn't be necessarily acceptable  
2 for us.

3 Q. So your attorney had expressed concerns to you --

4 A. Yes.

5 Q. -- about that this agreement creates some liability for  
6 the bank?

7 A. Yes.

8 Q. And then the second paragraph you raise this question  
9 about the value the bank would provide in this arrangement.  
10 You say, "It is unclear what value the bank provides in this  
11 arrangement to the Protected Parties." And was that also  
12 advice that you got from Mr. Busch?

13 A. Yes.

14 Q. You say, "We are asked to perform the work of  
15 administering account transfers, but we are only  
16 transferring in accordance with the direct instruction of  
17 Petters. Why can't Petters do this directly?"

18 So you raised those issues that your attorney had  
19 raised with you?

20 A. Yes.

21 Q. And this e-mail is just not going to Ms. Coleman at  
22 Petters, right?

23 A. Yes.

24 Q. You also sent that to the lawyer for the hedge fund?

25 A. Yes.

1 Q. So this wasn't some secret conversation between the bank  
2 and Petters?

3 A. No, not to my knowledge.

4 Q. The concerns and observations that your lawyer had about  
5 this agreement were shared directly with the lawyer for the  
6 hedge fund?

7 A. They were -- yeah, they were shared directly with  
8 Mr. Howse who had drafted that form, yes.

9 Q. So if we can look at the big picture again on this  
10 exhibit, then you offer some suggestions, right? At the  
11 bottom you say, "Can we set up a Trust Account similar to  
12 Lawyers' Trust Accounts or Real Estate Trust Accounts?"

13 Was that a suggestion that came from your  
14 attorney?

15 A. I don't recall specifically if it was suggested by  
16 someone within the bank or from our attorney.

17 Q. And your comment is, "This allows for the segregation of  
18 Protected Parties' funds from Petters operating funds."

19 So you would actually set up a separate account;  
20 is that correct?

21 A. Yes.

22 Q. And then if you set up the trust account, it would also  
23 solve the problem of the bank being put in the middle of  
24 things?

25 A. That was my understanding at the time, yeah.

1 Q. So you provided this suggestion and your observations  
2 about the agreements that you got from your lawyer to  
3 Mr. Howse and Ms. Coleman. Do you recall them responding to  
4 these points in any way?

5 A. I don't specifically recall.

6 Q. Okay. Was there -- did there come a point in time when  
7 you did end up having a signed Deposit Account Control  
8 Agreement?

9 A. Yes.

10 Q. Were you privy to all the discussions between the hedge  
11 fund and Petters about this agreement?

12 A. No.

13 Q. Were you ever invited to any meeting, you know, that  
14 they were discussing this subject?

15 A. No.

16 Q. Did you ever get provided copies of their, you know,  
17 markups or red lines of the Control Agreement where they  
18 were, you know, making changes and negotiating the terms?

19 A. Not that I recall, no.

20 Q. Was there a point in time -- I mean, do you know whether  
21 the final agreement is identical to the one that was sent to  
22 you by Ms. Coleman on February 14th, 2008?

23 A. The final agreement was drafted by Mr. Busch.

24 Q. Okay. So Mr. Busch and the lawyers for the hedge funds  
25 and the lawyers for Petters worked out the terms of the

1 agreement?

2 A. Yeah. I don't know who specifically was involved, but  
3 ultimately there was a document that was drafted by  
4 Mr. Busch that the parties to that agreement found  
5 acceptable.

6 Q. Okay. So did you know all the details of the  
7 relationship between the hedge fund and Petters?

8 A. No.

9 Q. Did you have copies of their contracts or purchase  
10 orders or invoices?

11 A. No.

12 Q. Did you have full transparency of what might be useful  
13 or effective or helpful for those parties in an agreement  
14 like this?

15 A. No.

16 Q. Did it come to your attention at some point in time that  
17 they thought they wanted to sign the agreement?

18 A. I'm sorry. Could you repeat that?

19 Q. Was there a point in time when it was brought to your  
20 attention that the agreement was ready to be signed?

21 A. I believe so, yes.

22 Q. And then you did sign it?

23 A. Yes.

24 Q. Okay. Now, let's look at Plaintiff's Exhibit 645. So  
25 this is -- this was shown to you yesterday by Mr. Marder,



1 and one of the things he said when he showed it to you is  
2 something about the bank destroying this agreement. Do you  
3 remember him saying that?

4 A. Yes.

5 Q. And I asked you yesterday did you have any knowledge of  
6 anybody at the bank destroying this agreement, and do you  
7 have any knowledge of that?

8 A. Hm-mmm.

9 THE COURT REPORTER: I'm sorry. What was the  
10 answer?

11 THE WITNESS: "No" was the answer. Thank you.

12 BY MR. MOHEBAN:

13 Q. And it's fair to say that as we see it up on the screen,  
14 this agreement has not been destroyed, right?

15 A. Correct.

16 Q. We're looking at it?

17 A. Yeah.

18 Q. Okay. And it has a label. You didn't talk about this  
19 with Mr. Marder, but it has a label and an exhibit number on  
20 it. Do you see that?

21 A. I do.

22 Q. And that has a date. Can you tell us the date.

23 A. September 21, 2010.

24 Q. And then it says, "MI" above that?

25 A. Yes.

1 Q. The version of this document that was shown to you  
2 yesterday, does it have a Bates number on it?

3 A. I'm not sure what a Bates number is exactly, but.

4 Q. Okay. Let me try to refresh you on that. You've sat  
5 for a number of depositions in this case and others, right?

6 A. Yes, I have.

7 Q. And from time to time you're shown documents?

8 A. Yes.

9 Q. And has it been explained to you in depositions that the  
10 origin of documents is sometimes determined by a Bates  
11 number, a number at the bottom of the page that identifies  
12 the document?

13 A. Yes.

14 Q. And it can also identify the origin of the document?

15 A. Okay.

16 Q. Do you remember --

17 A. I do recall.

18 Q. I am not trying to tell you that now. I just want to  
19 see if you remember that --

20 A. I do.

21 Q. -- from all the depositions that you have been in.

22 A. Yeah, I do recall that.

23 Q. This document doesn't have a Bates number on it; is that  
24 fair to say?

25 A. Yes.

1 Q. I mean, we have the number below, the P0645. That's the  
2 trial exhibit number.

3 A. Yes.

4 Q. I would like you to look in the binder. This hasn't  
5 been admitted yet, but look at Plaintiff's Exhibit 3.

6 A. Yes, I see it.

7 Q. Now, is this -- do you recognize this document?

8 A. I believe it's the same document that was on display on  
9 the screen here.

10 Q. Okay. Does it have that same stamp on it from September  
11 21, 2010?

12 A. Yes, it does.

13 Q. And if we go to -- I want to get you to the signature  
14 page so you can tell me that it's your signature. If you go  
15 to P-3-24, there's a place for a signature. Do you see  
16 that?

17 A. Yes.

18 Q. This document actually is a compilation of a couple  
19 agreements, isn't it?

20 A. Yes, it is.

21 Q. Okay. And then if we go to page P-3-17, is that also  
22 your signature?

23 A. Yes, it is.

24 Q. And is that a signature on the February 25th, 2008,  
25 Deposit Account Management Agreement?

1 A. February 25th, yes.

2 MR. MOHEBAN: Your Honor, I would offer  
3 Plaintiff's Exhibit 3.

4 MR. MARDER: No objection, Your Honor.

5 THE COURT: Plaintiff's Exhibit 3 is received in  
6 evidence.

7 BY MR. MOHEBAN:

8 Q. Now, if we go to the second page of Plaintiff's  
9 Exhibit 3, now we're looking at the same Deposit Account  
10 Management Agreement that you were shown yesterday by  
11 Mr. Marder, right? It says February 25th, 2008, at the top?

12 A. Yes.

13 Q. And it's got that same M&I Exhibit 11, September 21,  
14 2010, sticker on it, right?

15 A. Yes, it does.

16 Q. But does this version have a Bates number on it?

17 A. Yes, it does.

18 Q. And does that say, "MI"?

19 A. Yes.

20 Q. And is it your understanding that a document with an M&I  
21 Bates number would be a document produced by M&I Bank?

22 A. I believe so, yes.

23 Q. So this document, unlike the one that you were shown,  
24 this was a document that was used in some proceeding on  
25 September 21st, 2010, that was produced by M&I Bank? Is

1 that the way you read this?

2 A. Yeah. I'm not exactly an expert on, you know, how this  
3 Bates coding works or anything like that, but it does have a  
4 Bates number and it does reference MI on it.

5 Q. And the document is not destroyed because we're looking  
6 at it; is that right?

7 A. Yeah, and it's dated September 21 of 2010.

8 Q. Okay. Now, you were asked some questions about how  
9 these DACAs, Deposit Control Agreements, were to work  
10 yesterday.

11 Now, if we look at the fourth paragraph here, you  
12 were asked about this language, "WHEREAS, from time to time  
13 Petters will receive payments with respect to Transactions  
14 into its bank account at M&I which should have been paid to  
15 a 'lockbox' of a Protected Party or directly to a Protected  
16 Party."

17 So when you were reviewing this agreement and you  
18 saw the language "from time to time," did you understand  
19 that this was going to be occasionally that there was going  
20 to be payments, or did you understand it to be a regular  
21 event?

22 A. To me, the term "time to time" means it may happen, and  
23 time to time suggests that it's not expected to be frequent.

24 Q. And did you understand from this language that  
25 essentially it would have been a mistake if a transaction

1 payment went into this account because it should -- the  
2 language says it should have been paid to a lockbox?

3 A. Yes.

4 Q. So this agreement would go into effect, to your  
5 understanding, only if a mistake had been made by someone?

6 A. Yes.

7 Q. And then if we go to the next page, to Section 1 (c),  
8 it's a section on "Deposits into Account." The second  
9 sentence says, "Such deposits are not held in trust for the  
10 Protected Party." Do you see that?

11 A. Yes.

12 Q. So you had made the suggestion to Mr. Howse and  
13 Ms. Coleman why not have a trust fund. Is it a fair  
14 statement that they didn't end up having a trust account?

15 A. Yes, it's a fair statement.

16 Q. And then if we could go to paragraph 2(b), so that's the  
17 next page over -- I'm sorry. "Procedures for Deposit  
18 Account," do you see that at the bottom of the page? That's  
19 2(a).

20 And if we go to the next page, we'll get to 2(b).  
21 We need to back up, I think. I apologize. Make sure I have  
22 the right -- we're looking for the language that starts  
23 with, "Petters shall provide."

24 A. Yeah, it seems like --

25 Q. Do you know what? Let's switch, because this has got

1 some intermingled other documents. Let's switch to  
2 Exhibit 645, and now we can go to Section 2(b). So that's  
3 1(b). If we go to the next page. There we go. All right.

4 So this provision, we're talking about a section  
5 on the implementation of this Deposit Control Agreement, and  
6 this says, "Petters shall provide to each Protected Party  
7 and M&I at least once each week (or more often if necessary)  
8 a list of all Transactions funded by a Protected Party." Do  
9 you see that language?

10 A. I do.

11 Q. So was it your understanding that for you to do anything  
12 under this agreement, Petters would have to provide you a  
13 transaction list?

14 MR. MARDER: Objection, leading, Your Honor.

15 THE COURT: Overruled.

16 THE WITNESS: Yes, that was my understanding.

17 BY MR. MOHEBAN:

18 Q. And I think the testimony was established yesterday you  
19 never got a transaction list?

20 A. That's correct.

21 Q. The obligation here was for Petters to provide the list  
22 not just to M&I, but to the protected party, right?

23 A. Yes.

24 Q. So the protected party would know if they're not getting  
25 these lists just as well as M&I would know; is that your

Flynn - Direct  
1 understanding?

2 A. I would presume so, yes.

3 Q. So the way this was set up, did the protected party need  
4 to get notified by M&I that the lists were not being  
5 provided?

6 A. No.

7 Q. And if you didn't get the lists, could you fulfill your  
8 obligations under this agreement?

9 A. No.

10 Q. The date of this agreement was February 25th, 2008?

11 A. Yes.

12 Q. Okay. So how much time passed from when this agreement  
13 was implemented until the Ponzi scheme was discovered and  
14 put an end to?

15 A. I would guess it's about somewhere between five and six  
16 months.

17 Q. So this came at the very end of the Ponzi scheme?

18 A. Yes, it seems that way.

19 Q. Do you have an understanding of when the Ponzi scheme  
20 started?

21 A. No, I don't remember exactly.

22 Q. But this -- the first DACA, Deposit Account Agreement,  
23 that M&I entered into was just six months before the Ponzi  
24 scheme ended?

25 A. Yes.



1 Q. And in that six months, you didn't get any transaction  
2 lists from Petters; is that right?

3 A. That's correct.

4 Q. And the protected party, Mr. Howse or Mr. Howse's  
5 client, they never called you and said, Hey, what's going on  
6 with these transaction lists?

7 A. No. No one ever asked.

8 Q. You were also asked about the Deposit Control Agreement  
9 with Ritchie. That's Plaintiff's Exhibit 116. Can we look  
10 at that? And this one was entered into when?

11 A. Sometime in May.

12 Q. May of 2008.

13 A. Yes.

14 Q. So how much time passed between when this Account  
15 Agreement was entered and the Ponzi scheme was discovered  
16 and put an end to?

17 A. About four months.

18 Q. Okay. And then we also have the agreement with  
19 Interlachen that's Plaintiff's Exhibit 117. Can we see  
20 that? When was that agreement entered into?

21 A. May 29th, 2008.

22 Q. So this is at the end of May, right?

23 A. Yes.

24 Q. So then we have June, July, August, and then September  
25 the scheme is discovered; is that right?

1 A. Yes.

2 Q. Were you fully prepared to implement and fulfill any  
3 obligations under any of these Deposit Control Agreements?

4 A. That was my expectation, yes.

5 Q. Is it a fair statement that your performance of the  
6 three agreements was dependent on Petters or other third  
7 parties providing information to the bank?

8 A. Yes.

9 Q. The Interlachen and Ritchie agreements were going to be  
10 triggered by funds being deposited into a special account  
11 that had been set up for them; is that right?

12 A. Yeah, I would have to review those in more detail, but  
13 that's my recollection.

14 Q. In the short time between when you entered into these  
15 agreements and the Ponzi scheme was discovered, did any of  
16 the hedge funds contact you to ask about what was going on  
17 with these agreements?

18 A. No, I don't recall that ever happening.

19 Q. Did anyone complain to you that there was something that  
20 M&I wasn't doing that they should have been doing?

21 A. Not that I recall, no.

22 Q. Did Petters complain about that?

23 A. No.

24 Q. So I'm going to conclude here with just a couple of  
25 questions.

Flynn - Recross

1           During the time that you were working at M&I Bank  
2           and Petters was your customer, did you know that Petters was  
3           running a Ponzi scheme?

4           A.   Only after it had been exposed.

5           Q.   Was there ever a point in time where you suspected they  
6           were running a Ponzi scheme?

7           A.   No.

8           Q.   Are you aware of anyone else at M&I Bank who suspected  
9           there was a Ponzi scheme?

10          A.   No.

11          Q.   Did you do anything that you would say was turning a  
12          blind eye to the Ponzi scheme?

13          A.   No.

14          Q.   And the first you heard about it was when law  
15          enforcement came to you with a subpoena for your  
16          cooperation?

17          A.   That's correct, yes.

18          Q.   And since that time, you've cooperated and come to court  
19          when called on to tell what you know honestly and  
20          truthfully?

21          A.   Yes.

22               MR. MOHEBAN: I have no further questions.

23                               **RECROSS-EXAMINATION**

24          BY MR. MARDER:

25          Q.   Good morning, Mr. Flynn.

1 A. Good morning.

2 Q. I want to ask you some questions this morning about some  
3 things that Mr. Moheban asked you yesterday, and then we  
4 will move into today.

5 I would like to start, if you could, please, by  
6 looking at the MIContacts entry that he asked you about at  
7 the beginning of your examination, which was Exhibit P-2,  
8 page 14.

9 A. Okay. Yes, I see it on the screen.

10 Q. You recall this is the document that Mr. Moheban showed  
11 you at the beginning of his examination, and you remember he  
12 took the white part in the middle of the page and compared  
13 it to the other version to see if there were any  
14 differences; do you recall that?

15 A. Yes, I do.

16 Q. Okay. When he did that, did he just blow up the white  
17 part, or did he blow up the fields above it? Do you  
18 remember?

19 A. I don't specifically recall from that question.

20 Q. Okay. Well, here's what we're going to do. We're going  
21 to put Plaintiff's Exhibit 2, page 14, at the bottom of the  
22 screen. Actually, sorry, page 13. We can remove page 14.  
23 We don't need that.

24 We are just going to put page 13 at the bottom of  
25 the screen, and we're going to blow up the top part of that.

1 And now we're going to look at Plaintiff's Exhibit 145. So  
2 now what we're looking at are the fields at the top of the  
3 two MContacts -- right? -- one of them being the one that  
4 was the original form on the top, and one of them on the  
5 bottom that says, "Last edited 12-4-2008." Do you see that?

6 A. I do.

7 Q. And that's six years after the entry, right?

8 A. Yes.

9 Q. Okay. Now, if you look at the original version, you see  
10 it has the name -- you see it has a field called "Bank  
11 Primary" up at the top?

12 A. Yes.

13 Q. That's the person who owned the relationship, right?

14 A. Yes.

15 Q. And then if we look down where it says, "Last edited  
16 2-4-2008." Do you see that?

17 A. I do.

18 Q. Your name has been removed, right?

19 A. Yes.

20 Q. And this was after the Court issued the injunction that  
21 documents were not to be altered, right?

22 A. I don't know when my name was removed from this.

23 Q. But it says, "Last edited 12-4-2008," right?

24 A. Yes.

25 Q. And that was after the Ponzi scheme was revealed to the

1 public?

2 A. Yes.

3 Q. And that's a time at which you didn't want your name  
4 associated with Mr. Vennes, right?

5 A. I don't think that's a fair characterization.

6 Q. Let's move next to the ACE Reports that Mr. Moheban  
7 asked you about yesterday. You recall Mr. Moheban showed  
8 you some ACE Reports yesterday?

9 A. Yes.

10 Q. And the reports he showed you, they related to the  
11 profitability of the Petters account, right?

12 A. Yes.

13 Q. And the reports that he showed you were the last few  
14 months before the Ponzi scheme unraveled, right?

15 A. That's right, yes.

16 Q. And you understand how Ponzi schemes work in general,  
17 right?

18 A. I do.

19 Q. You understand that investor funds from new investors  
20 are used to pay off old investors?

21 A. Yes.

22 Q. And eventually they have to collapse because you can't  
23 keep collecting more and more investors, right?

24 A. Right.

25 Q. Okay. So the ones that he showed you were from the last

1 few months before the scheme unraveled, correct?

2 A. Yeah. I believe it was about the last year, yes.

3 Q. The last few months, it was July and August, right?

4 A. I think we looked at some reports that were dated  
5 earlier than that as well.

6 Q. I think you testified that the reason the PCI account  
7 was not more profitable was because the daily balance wasn't  
8 that high, right?

9 A. Yes.

10 Q. But the reason the daily balance wasn't that high was  
11 because Mr. Petters was moving money in and out of the  
12 account so fast that the daily balance would never be high,  
13 right?

14 A. That's correct.

15 Q. Did you know that back during the time frame when you  
16 were supervising the account?

17 A. No, I didn't.

18 Q. And while we're talking about profitability, you  
19 mentioned that loans are the most profitable part of your  
20 business in response to Mr. Moheban's questions, right?

21 A. Yes, I did.

22 Q. And you had various meetings where you tried to pitch to  
23 Petters the idea of the bank lending money for various real  
24 estate and other projects, right?

25 A. We were asked by Petters to explore those projects.

1 Q. But you never once pitched to PCI the idea of the bank  
2 funding any of these sales of electronics from wholesalers  
3 to retailers, did you?

4 A. They never expressed that as a need to us.

5 Q. But that's not something that you pitched?

6 A. No.

7 Q. Because you weren't interested in that business, right?

8 A. I don't think that's a fair characterization. The  
9 client never asked us to take a look at that. Those other  
10 projects, they did.

11 Q. Is it your testimony that the only time that you  
12 suggested a bank service to the Petters Group is when they  
13 asked you for it?

14 A. I'm not saying that's absolutely everything. I don't  
15 recall from this time period, but I was never asked by  
16 Petters to take a look at financing Petters Company.

17 Q. But as we discussed, it was very important to you to try  
18 to grow the bank's business -- right? -- that's part of your  
19 job?

20 A. Yes.

21 Q. And you would frequently pitch to your clients new ideas  
22 for new bank services?

23 A. If we felt they needed them and they wanted to discuss  
24 them, yes.

25 Q. And if it was something you thought you could make money



1 off of?

2 A. Well, we're in business, yes. It's not a nonprofit.

3 Q. But you never, as you sit here today, have any  
4 recollection of asking Mr. Petters if the bank could invest  
5 in his PCI business relating to the purchase and sale of  
6 electronics, right?

7 A. That's correct.

8 Q. I believe that you testified yesterday that you had to  
9 go to a committee to give a loan to Mr. Vennes?

10 A. We didn't quite make it to committee, but that would  
11 have been part of the process had we decided we wanted to  
12 move forward.

13 Q. But you had the ability to approve loans up to a certain  
14 amount on your own without going to a committee, right?

15 A. I don't specifically recall approval authority.

16 Q. Do you have your binder there?

17 A. I do.

18 Q. If I could ask you, please, to turn to your transcript  
19 from 10-30-17.

20 A. Okay. Got it.

21 MR. MOHEBAN: Page?

22 MR. MARDER: I will get it to you in a second.

23 BY MR. MARDER:

24 Q. I would ask you to turn to page 24, please.

25 A. Yes.

1 Q. If I could ask you to take a look at page 24-23 through  
2 25-2. Can you read that to yourself.

3 A. I'm sorry. What lines, sir?

4 Q. Sure. Page 24 --

5 A. Yes.

6 Q. -- line 23 through page 25, line 2.

7 (Witness reviews document)

8 A. Okay. I see the testimony.

9 Q. Okay. So does that refresh your recollection that you  
10 had some authority to lend to customers without going to the  
11 creditors' committee?

12 A. As I read this, that's what I answered at that time, but  
13 as we sit here today, I simply do not recall.

14 Q. And do you recall that amount was roughly up to  
15 \$3 million?

16 A. I see that's how I answered it here, yes.

17 Q. Okay. Now, I think you told us about this conversation  
18 that you had with Mr. Vennes, that he was going to walk the  
19 better path now that he was out of jail. Is that what he  
20 told you?

21 A. Effectively, yes. I'm paraphrasing.

22 Q. But the bank rejected his loan request, right?

23 A. That's correct.

24 Q. So his promises of walking a better path weren't enough  
25 to satisfy the bank at the time, right?

1 A. That's correct.

2 Q. Now I would like to go to some of the questions that  
3 Mr. Moheban asked you about today. I'd ask you first to  
4 turn to Plaintiff's Exhibit 20, which relates to the DACA  
5 agreement that you testified about. I would ask you to go  
6 to page 2 of that agreement -- I'm sorry, page 2 of that  
7 document.

8 A. Yes.

9 Q. And if we could look at the middle paragraph and blow  
10 that up, there's a line there that says, "I don't know that  
11 something like this should be done by the business banking  
12 team versus trust." Right?

13 A. Yes, it does.

14 Q. And what she's talking -- and if you look at the  
15 previous sentence, what she's talking about is that, "The  
16 Control Agreement talks about a Transaction list of the  
17 obligor, and that the bank shall compare each payment  
18 received by wire transfer or otherwise to the most recently  
19 received transaction list." Do you see that?

20 A. I do.

21 Q. And what Ms. Moline is saying is that she doesn't think  
22 something like that should be done by the business banking  
23 group, right?

24 A. That's what she wrote, yes.

25 Q. And this concept of getting a transaction list and

1 comparing it to activity was something that made its way  
2 into the final agreement, right?

3 A. Yes.

4 Q. Now, in response to Mr. Moheban's questions, you  
5 explained -- if we could look at the first paragraph, it  
6 says there that she spoke with Peggy Franzen and that there  
7 was a Control Agreement that was approved for the bank. Do  
8 you see that?

9 A. Yes.

10 Q. So you testified that the bank had done a Control  
11 Agreement before?

12 A. That was my understanding based on this language.

13 Q. Do you know anything about that Control Agreement?

14 A. I don't.

15 Q. Do you know whether it contained a provision that there  
16 would be a transaction list that the bank was going to  
17 compare each wire transfer to?

18 A. No, I don't.

19 Q. So as far as you know, this DACA that you received was  
20 the first time the bank had ever been requested to do that,  
21 right?

22 A. As far as I know, but I can't say for certain.

23 Q. Now, if we go to page 3, I would like to blow up the  
24 first paragraph of the e-mail you wrote. It says there,  
25 "Attached is a request from one of our customers regarding

1       some special handling for a new account to be opened." Do  
2       you see that?

3       A. I do.

4       Q. Those words, "special handling," those were words that  
5       you chose, right?

6       A. Yes.

7       Q. Okay. Now I would like you to look, please, back at the  
8       document Mr. Moheban showed you, which is Plaintiff's  
9       Exhibit 5. Do you recall he showed you page 34 of that?

10      A. Yes.

11      Q. And this is a list of red flags to be on alert for,  
12      right?

13      A. Yes.

14      Q. Let's look at the last bullet point there. Do you see  
15      it says, "A customer who requests special treatment or  
16      'exceptions' to the documentation rules." Right?

17      A. I see that, yes.

18      Q. And those are things that you were supposed to be on  
19      alert for, right?

20      A. It was part of our compliance training, yes.

21      Q. Okay. Now, that last paragraph has an "or" in the  
22      middle of it, right?

23      A. Yes.

24      Q. And Mr. Moheban pointed you to the section that talks  
25      about "exceptions to the documentation rules." Do you see

1 that?

2 A. I do.

3 Q. But the first part of it lists, "A customer who requests  
4 special treatment," right?

5 A. Yes.

6 Q. And in your own words, this was a request for special  
7 handling, right?

8 A. As I wrote that e-mail, yes.

9 Q. Now if we could go to Plaintiff's Exhibit 21, please.  
10 I'd ask -- this was a document that Mr. Moheban showed you  
11 this morning, right?

12 A. Yes.

13 Q. If I could ask you to turn to page 2 of that, and we're  
14 going to blow up the e-mail at the very bottom there from  
15 Ms. Schwede. She says there, "I do not like 2C." Right?

16 A. Yes.

17 Q. It says, "I do not think M&I wants to be responsible for  
18 reconciling an account and transferring funds out." Right?

19 A. Yes.

20 Q. Now, this file agreement that you signed with Palm Beach  
21 had a Section 2(c) in it, right?

22 A. I would have to take a look at the document again, but  
23 I'm not going to dispute it.

24 Q. But it did have a section that required you to reconcile  
25 a transaction list with transactions, right?

1 A. Yes.

2 Q. And that's the very thing that the assistant vice  
3 president/customer service manager -- I'm sorry, that's the  
4 very thing that the assistant vice president/customer  
5 service manager told you she didn't like in the agreement,  
6 right?

7 A. That's correct, as it was written by the original  
8 document.

9 Q. I would ask you next, please, to look at Plaintiff's  
10 Exhibit 23. If we could blow up the text of that document,  
11 please. Do you recall Mr. Moheban asking you if Frank  
12 Vennes' name was mentioned in that document?

13 A. Yes.

14 Q. But at this time, you already knew that the attorney,  
15 Mr. Howse, represented Frank Vennes, right?

16 A. That is correct, yes.

17 Q. But you didn't need it to be in the document to know  
18 that, right?

19 A. I was glancing at this as he was asking questions, but  
20 you are correct.

21 Q. Next I would like to go to Plaintiff's Exhibit 645,  
22 please. You recall Mr. Moheban asking you some questions  
23 about whether this document had been destroyed by M&I or  
24 not?

25 A. Yes.

1 Q. Okay. You see the sticker on the bottom of the page  
2 there?

3 A. I do.

4 Q. It's an exhibit number to a deposition, right?

5 A. Yes.

6 Q. So you know this was marked at a deposition -- right? --  
7 that's what it appears?

8 A. That's what it appears to be, yes.

9 Q. Now if we go to Plaintiff's Exhibit 3, please, and I  
10 would like you to look at Plaintiff's Exhibit 3, page 2. In  
11 fact, if we can leave them both on the screen and put them  
12 side by side.

13 So you see the document on the right that's marked  
14 at the deposition has no Bates number on it, right?

15 A. Yes, that's correct.

16 Q. And the document on the left has a Bates number, right?

17 A. Yes.

18 Q. So what M&I did is produce a document that someone else  
19 gave them at a deposition, right?

20 MR. MOHEBAN: Objection, lack of foundation.

21 THE COURT: Overruled. You may answer.

22 THE WITNESS: I don't know the answer to your  
23 question.

24 BY MR. MARDER:

25 Q. So as you sit here today, you have no information about



1 whether or not M&I actually produced this document from its  
2 files?

3 A. I just simply do not recall.

4 Q. And as far as you know from looking at this record, it  
5 appears that the Bates numbers were added after this was a  
6 deposition exhibit -- right? -- because the original  
7 deposition exhibit doesn't have numbers on it?

8 MR. MOHEBAN: Objection to the notion that one is  
9 the original. We don't have any foundation for that.

10 THE COURT: Sustained.

11 BY MR. MARDER:

12 Q. In any event, Mr. Flynn, you're not the right person to  
13 testify about this, right?

14 A. I'm not a legal expert or an attorney.

15 Q. You have no idea who produced this document or who put  
16 Bates numbers on it or when, right?

17 A. That's correct.

18 Q. Let's go back to Plaintiff's Exhibit 645. I think you  
19 testified that this agreement would only go into effect if a  
20 mistake was made?

21 A. I don't believe I said that exactly, but I was  
22 referencing the term "time to time."

23 Q. Didn't you use the term "a mistake"?

24 A. I don't believe that I said mistake. I could be wrong.  
25 I don't recall specifically.

1 Q. If we go to page 3 of this agreement, I'd like to blow  
2 up Section (b). This is the section that talks about the  
3 transaction list, right?

4 A. Yes.

5 Q. And it says that, "Petters shall provide each Protected  
6 Party and M&I at least once each week (or more often if  
7 necessary to enable M&I to discharge its obligations  
8 hereunder), a list of all Transactions funded by a Protected  
9 Party with respect to which payment may be received by M&I  
10 for deposit into the Deposit Account." Right?

11 A. Yes.

12 Q. So that is supposed to happen once each week, right?

13 A. That was in the agreement, yes.

14 Q. Then if we go to the next paragraph, paragraph (c), that  
15 talks about how M&I is supposed to compare each payment  
16 received by wire transfer or otherwise to the most recently  
17 received transaction list, right?

18 A. Yes.

19 Q. As I think you explained to -- in response to  
20 Mr. Moheban's testimony [sic], you never received any  
21 transaction list, right?

22 A. That's correct.

23 Q. And did you make some assumptions as to why?

24 A. I didn't make any assumptions, no.

25 Q. Did you call up anybody at PCI and ask why?

1 A. No.

2 Q. If we could please go to DX-67 -- hang on a second. I  
3 may have the wrong exhibit number. I apologize.

4 (Mr. Marder and Ms. Holmes confer)

5 BY MR. MARDER:

6 Q. I apologize. I had the wrong exhibit number.

7 A. No problem.

8 Q. If we could go to DX-40067. Let's go to page 38. We're  
9 going to blow up the third line from the bottom, the  
10 speaker's notes. You see there it says, "It's not always  
11 easy to ask the tough questions to make sure we understand  
12 the customer and their activity"? Do you see that?

13 A. I see that, yes.

14 Q. Finally, I want to ask you about something that  
15 Mr. Moheban asked you right before he finished asking you  
16 questions. He asked you if you had ever turned a blind eye  
17 to the Petters situation, right?

18 A. That's correct.

19 Q. Now, yesterday when you testified, you admitted that  
20 understanding your customer's bank account activity was an  
21 important part of being able to identify whether there was  
22 unusual or suspicious activity relating to that customer,  
23 right?

24 A. Yes.

25 Q. But you never reviewed the transaction activity in the

1 PCI account, correct?

2 A. That's correct.

3 Q. You didn't know that billions and billions of dollars  
4 were running through that account, right?

5 A. That's correct.

6 Q. Even though the person who introduced PCI's business to  
7 you was a convicted felon, right?

8 A. That's correct.

9 Q. And even though you signed the DACA agreement, right?

10 A. Yes.

11 Q. And even though the DACA agreement said that you were  
12 supposed to get a weekly transaction list, right?

13 A. That was in the document, yes.

14 Q. And even though you never got a transaction list, right?

15 A. That's correct.

16 Q. And even though you never asked why, right?

17 A. That's correct.

18 Q. Sir, can you think of a clearer example of somebody who  
19 turned a blind eye?

20 MR. MOHEBAN: Objection, argumentative.

21 THE COURT: Sustained.

22 MR. MARDER: I have no further questions for this  
23 witness.

24 MR. MOHEBAN: Your Honor, one or two follow-up  
25 questions is all I have.

THE COURT: You may.

**REDIRECT EXAMINATION**

BY MR. MOHEBAN:

Q. Mr. Flynn, you were asked about, again, this notion that Mr. Howse represented Frank Vennes. You had been told that, right?

A. Yes.

Q. And you have worked with lawyers like Kevin Busch at Moss & Barnett, correct?

A. Yes.

Q. Lawyers have more than one client -- is that right? -- in your experience?

A. I would presume so, yes.

Q. M&I Bank wasn't the only client for Mr. Busch?

A. Correct.

Q. And the fact that Mr. Howse had represented Mr. Vennes at some point in time on something, does that mean that he was representing Mr. Vennes on this Deposit Control Agreement?

A. I was directed to Mr. Howse by our client, and that's who I interacted with.

Q. Did anyone ever tell you that Mr. Howse was representing Mr. Vennes with respect to this Deposit Control Agreement?

A. I do recall some e-mail with Deanna Coleman that there was a connection, affiliation between Frank and Mr. Howse.

1 I do have that recollection.

2 Q. So you knew that Mr. Howse represented Mr. Vennes. My  
3 question is: Did anyone ever tell you that for this Palm  
4 Beach Deposit Control Agreement, that Mr. Vennes was  
5 involved with that?

6 A. I don't recall that.

7 MR. MOHEBAN: That's all I have.

8 THE COURT: Anything further?

9 MR. MARDER: Nothing further, Your Honor.

10 THE COURT: Sir, you are excused.

11 THE WITNESS: Thank you, Your Honor.

12 MR. COLLYARD: May I proceed, Your Honor?

13 THE COURT: Let's let things settle down.

14 (Pause)

15 THE COURT: Counsel, you may proceed.

16 MR. COLLYARD: Your Honor, plaintiff calls its  
17 next witness adverse by video. It's a former BMO Harris  
18 Bank employee named Mr. Raymond Neufeldt, who during the  
19 relevant time in this case was a manager in BMO's money  
20 transfer department, which included the bank personnel that  
21 processed all the wire transfers in and out of the Petters  
22 Company, Inc. account. We would like to play that video and  
23 also offer along with that video certain exhibits into  
24 evidence.

25 THE COURT: You may.

1 MR. COLLYARD: And by the way, Your Honor, just  
2 for your information, the video is about 90 minutes long.

3 THE COURT: Thank you.

4 MR. COLLYARD: Along with the video, plaintiff  
5 offers Plaintiff's Exhibit 16.

6 THE COURT: Exhibit 16 is received. I hear no  
7 objection.

8 MR. COLLYARD: Plaintiff offers Exhibit 355.

9 MS. GITTES: No objection.

10 THE COURT: 355 is received.

11 MR. COLLYARD: Plaintiff offers P-356.

12 MS. GITTES: No objection.

13 THE COURT: 356 is received.

14 MR. COLLYARD: Plaintiff offers P-357.

15 MS. GITTES: No objection.

16 THE COURT: Exhibit 357 is received.

17 MR. COLLYARD: Plaintiff offers P-359.

18 MS. GITTES: No objection.

19 THE COURT: Exhibit 359 is received.

20 MR. COLLYARD: Plaintiff offers P-360.

21 MS. GITTES: No objection.

22 THE COURT: Exhibit 360 is received.

23 MR. COLLYARD: Plaintiff offers P-361.

24 MS. GITTES: No objection.

25 THE COURT: Exhibit 361 is received.

1 MR. COLLYARD: Plaintiff offers P-362.

2 MS. GITTES: Apologies, Your Honor. We're just  
3 checking our list for one moment.

4 THE COURT: That's quite all right.

5 MS. GITTES: Thank you.

6 (Pause)

7 MS. GITTES: No objection. Thank you.

8 THE COURT: 362 is received.

9 MR. COLLYARD: Two more, Your Honor. Plaintiff  
10 offers P-364.

11 MS. GITTES: No objection.

12 THE COURT: It's received.

13 MR. COLLYARD: And plaintiff offers P-372.

14 MS. GITTES: No objection. Thank you.

15 THE COURT: P-372 is received.

16 MR. COLLYARD: Thank you, Your Honor.

17 **(Raymond Neufeldt)**

18 **DEPOSITION TRANSCRIPT PLAYED**

19 Q. Can you please state your name for the record.

20 A. Raymond Neufeldt.

21 Q. Mr. Neufeldt, have you ever been deposed before?

22 A. To my knowledge, no. I mean, this is obviously a first  
23 here for this, you know, on film and so forth. I've been  
24 asked, I'm sure, of other things.

25 Q. But as far as you can recall sitting down having a court



1 reporter --

2 A. No.

3 Q. No?

4 A. No.

5 Q. So can you just tell me a little bit about your work  
6 history, when you started at M&I Bank.

7 A. I believe it was in 1972 I started in check processing  
8 and worked my way up to be the manager of check processing  
9 in the late '70s and stayed in check processing until -- I  
10 stayed associated with it until 1997. The last five or so  
11 years, I was more into sales support than in managing the  
12 area directly. And then in 1997, I was brought in to manage  
13 the money transfer area.

14 Q. How long did you stay in the money transfer department?

15 A. Until it was eliminated, if you will, by the BMO  
16 acquisition.

17 Q. Do you recall when that was?

18 A. I left in approximately 2014, first quarter.

19 Q. What was -- were you working at that time for BMO Harris  
20 Bank?

21 A. Yes.

22 Q. What was your role at BMO Harris when you left?

23 A. I was the money transfer manager.

24 Q. Are you currently employed?

25 A. No, I am not.

1 Q. What did you do to prepare for today's deposition?

2 A. Reviewed transactions, how they looked, and that is it.

3 Q. Did you talk to anyone at BMO Harris Bank?

4 A. No.

5 Q. Did you talk to anyone that you used to work with at M&I  
6 Bank?

7 A. Yes. Well, the person that worked for me I did talk to.

8 Q. Who was that?

9 A. Linda Perleberg.

10 Q. You said that Linda worked for you. What role did Linda  
11 have when she worked for you?

12 A. She worked in money transfer. He was a section leader,  
13 senior person.

14 Q. You said "section leader" and then you said "senior  
15 person." Is that basically what a section leader is,  
16 someone more senior?

17 A. More responsibility.

18 Q. And what responsibilities did she have as a section  
19 leader?

20 A. Well, she could initiate wire transfers, follow a  
21 procedure. She could review money transfers for anything  
22 that went to exception queues and then release as  
23 appropriate.

24 Q. We're going to get into the nuts and bolts of what an  
25 actual transfer looked like and the process in an a little

1 bit. But before I forget, what -- what is an exception  
2 queue?

3 A. It is when a transaction is routed that does -- because  
4 there is something within the transaction that is causing it  
5 to not go further, stopping it for review.

6 Q. Can you give examples of what some of those exceptions  
7 might be.

8 A. An example would be OFAC, which is the Office of Foreign  
9 Asset Control, the transaction that hit on one of the  
10 criteria within OFAC.

11 Q. Do you know whether any of the PCI wires ever ended up  
12 in the exception queue?

13 A. PCI, that is?

14 Q. Petters Company, Inc., Incorporated?

15 A. I cannot say they did.

16 Q. In your personal capacity, when did you first learn  
17 about the Petters Ponzi scheme?

18 A. When it was stopped, if you will.

19 Q. Would that be in late September of 2008?

20 A. Yes.

21 Q. Do you recall from whom you learned about the scheme?

22 A. Not specifically, but it would have been somebody within  
23 the area that got a call from appropriate authorities  
24 looking for more detail.

25 Q. Do you ever have any interaction with Tom Petters or his

1 companies while he banks at --

2 A. No.

3 Q. -- M&I?

4 A. No.

5 Q. I'm handing you what's been marked as Exhibit 267. It's  
6 a Memorandum of Interview, and on the top it says, "Internal  
7 Revenue Service, Criminal Investigation." The date is  
8 November 17th, 2008. And under "Participants," you're  
9 listed -- your name is misspelled, but you're listed as wire  
10 department manager by phone. Do you see that?

11 A. Yes.

12 Q. Does this refresh your recollection as to whether you  
13 participated in a call with the IRS in November 2008?

14 A. I may have participated.

15 Q. So I'm going to ask you -- this is a summary of that  
16 call made by a special agent, and so I understand that it's  
17 not something that you've written down, but I want to walk  
18 through some of these to see whether the statements in here  
19 comport with your understanding of the Petters account and  
20 wires in and out of that account.

21 So in paragraph 1 it says, "All incoming wires  
22 into the PCI account received by the wire department in  
23 Milwaukee." Did that wire department in Milwaukee have a  
24 particular name?

25 A. The money transfer department.

1 Q. What was -- is the money transfer department also  
2 referred to as the Money Transfer Center?

3 A. Yeah.

4 Q. What about a relationship, if any, between the Money  
5 Transfer Center and treasury management services?

6 A. We work with them closely.

7 Q. And in broad strokes, what did that -- what did working  
8 with them closely entail?

9 A. Treasury management was an area that worked with  
10 customers to make them efficient in handling their  
11 operations, and part of that would be money transfers.

12 Q. So is it a fair characterization to say that treasury  
13 management may help suggest some of the services that the  
14 Money Transfer Center would actually carry out?

15 A. Yes.

16 Q. Can you explain the process when an incoming wire came  
17 into the Money Transfer Center for PCI?

18 A. Any transfer coming in would go into an incoming queue,  
19 and it would then be posted or a memo posted to the  
20 appropriate account that it came into and in the deposit  
21 system.

22 Q. Can I just stop you right there? What does "memo  
23 posted" mean?

24 A. That means it is there for purposes of availability and  
25 seeing that it was -- it had arrived.

1 Q. So once a memo posted, what happened next?

2 A. It would stay there until the end of the day when the  
3 deposit system was posted. The memo posts would go away,  
4 but the transaction would be part of the file sent to the  
5 deposit system for posting.

6 Q. And what -- when you reference the "deposit system,"  
7 what does that mean?

8 A. That is the system that has got all of the M&I demand  
9 deposit accounts in it and their activity; debits, credits,  
10 so forth, balance.

11 Q. What would happen at the end of the day when it was  
12 posting to that deposit system?

13 A. The deposit system then would be updated with all other  
14 transactions that went to it; checks, check deposits, ATM  
15 transactions. Anything that affected the balance would then  
16 be posted at -- to that specific account that it was  
17 associated with.

18 Q. And when you say "posted to that specific account," does  
19 that mean that at that point it would appear in the account  
20 for purposes of use by the --

21 A. Yes.

22 Q. -- customer?

23 A. Yes.

24 Q. Yes?

25 What, if any, of the process you just described

1 was automated versus requiring human intervention?

2 A. All of it was automated.

3 Q. Was there any part of the receipt of an incoming wire  
4 for the PCI account that required someone in the Money  
5 Transfer Center to interact to ensure that that -- the  
6 incoming wire went through?

7 A. Wires were touched, but not to review, but just to pass  
8 on.

9 Q. And when you say "touched to pass on," what does that  
10 mean?

11 A. If they came in, they would be within our system, but  
12 then they would be memo posted or transmitted to the deposit  
13 system for memo posting.

14 Q. When you -- and when you say "they would be memo  
15 posted," is that something that a human would have to go in  
16 and do to make that memo posting?

17 A. No.

18 Q. So that would be done automatically as well?

19 A. Yes.

20 Q. How did M&I -- how did the M&I system get notified of an  
21 incoming wire in the first instance?

22 A. Through that memo posting procedure. You're talking now  
23 specifically the deposit system?

24 Q. Yes.

25 A. Okay. Yeah.

1 Q. When that was -- when it was posted to the system, was  
2 anyone else at the bank alerted that the money had come in?

3 A. Not specifically that I'm aware of. I mean...

4 Q. Would -- for example, let's say an incoming wire came in  
5 for a particular account. Would the relationship manager on  
6 that account be notified that a wire transfer had been  
7 received for that account?

8 A. No, not unless -- I will say if there was a specific  
9 transaction that was occurring, a real estate transaction,  
10 and the funds had to be there for the account officer to  
11 see, they would be notified then, but not as a matter of  
12 routine.

13 Q. In that more exceptional circumstance, how -- you gave  
14 the example of a real estate transaction. How would the  
15 account relationship manager be notified that that wire had  
16 come in?

17 A. Phone call.

18 Q. Who would make that phone call?

19 A. It was somebody in the money transfer department.

20 Q. And how would the person in the money transfer  
21 department know that the incoming wire had come in?

22 A. We would look at the account, we'd watch for it.

23 Q. What would you -- what would the people in the Money  
24 Transfer Center look at to see whether an account -- whether  
25 a wire had come in?



1 A. Could look at the deposit system to see if a memo posted  
2 or do an inquiry into the money transfer system.

3 Q. As part of an incoming wire process, was the -- was a  
4 customer who was receiving that incoming wire notified about  
5 the wire coming in?

6 A. If they had requested it, yes.

7 Q. And what would be the process if a customer had  
8 requested it for them to be notified?

9 A. If they were using a money transfer work station, they  
10 could do the inquiry themselves into their money transfer  
11 activity. They could also have it set up for a call to go  
12 to them to notify them. They would be notified in the  
13 future when a statement was sent to them.

14 Q. Were customers also notified by -- by letter? Could  
15 customers also be notified by letter that an incoming wire  
16 was received?

17 A. I'm not aware of that being done, but, I mean, a  
18 statement was mailed or could be mailed.

19 Q. How often was that statement mailed?

20 A. That was daily.

21 Q. And who at M&I was responsible for mailing that  
22 statement?

23 A. It was the mailroom.

24 Q. What -- who at M&I was responsible for generating the  
25 information that was mailed to the customer?

1 A. Money transfer department.

2 Q. And if a customer had requested to be notified by mail  
3 or -- well, requested to be notified by mail, when would the  
4 people in the Money Transfer Center collect the information  
5 to send that to the customer?

6 A. It would be at the end of the day or prior to the  
7 following day.

8 Q. Was notice also given to customers about incoming wires  
9 by fax?

10 A. Yes.

11 Q. And was the Money Transfer Center responsible for  
12 sending out those faxes?

13 A. It was infrequent. I cannot say.

14 Q. Do you know whether those faxes when they were sent out  
15 required human intervention?

16 A. I can't say.

17 Q. So you're not sure whether if a customer requested fax  
18 notification related to an incoming transfer, whether  
19 someone in your department personally faxed a confirmation  
20 sheet to the customer after a particular wire?

21 A. I believe it would have been, but, again, I can't say  
22 for sure, system generated.

23 Q. When you say "system generated," does that mean you  
24 think that if they had requested a fax, that it would have  
25 been automatically --

1 A. Right.

2 Q. -- sent to the customer? Is that right?

3 A. Yes.

4 Q. We'll go back to Exhibit 267. The second paragraph  
5 says, "Outgoing wire transfers can be done over the phone.  
6 For those customers who conduct telephonic wire transfers,  
7 there is a formal agreement in place with M&I. The customer  
8 has to identify the authorized individuals that can conduct  
9 the transactions and also create a Personal Identification  
10 Number to be used with the transfer request." Do you see  
11 that?

12 A. Yes.

13 Q. Is this -- is that consistent with your understanding of  
14 the outgoing wire requests process that PCI engaged in?

15 A. It was available to them. I know they -- yes.

16 Q. This paragraph references a formal agreement in place.  
17 Can you tell me what that formal agreement is.

18 A. An agreement that was signed by the appropriate person  
19 at the account that is being used and identifying those  
20 people that can initiate.

21 Q. Would it be called a Wire Transfer Agreement?

22 A. Yes.

23 Q. I'm handing you what's been marked as Exhibit 268. It's  
24 Bates labeled MIPB000669. Do you see that at the bottom?

25 And it's a compilation of forms produced by BMO in this

1 case. I'll ask you to just page through it.

2 I will direct you to specific provisions, but, in  
3 general, you've had a chance to look it over. Is this  
4 consistent with your understanding of what a Wire Transfer  
5 Agreement --

6 A. Yes.

7 Q. -- looks like?

8 Yes?

9 A. Yes.

10 Q. And on the first page, you'll see that for  
11 "Customer/Company Name," Petters Company, Inc. is listed.  
12 Do you see that?

13 A. Yes.

14 Q. At the bottom it's dated January 17, 2006. Do you see  
15 that?

16 A. Yes.

17 Q. Have you seen any of these documents before this  
18 morning?

19 A. No.

20 Q. Do you know whether there was a Wire Transfer Agreement  
21 in place for Petters Company, Inc. before January 2006?

22 A. No.

23 Q. I want to direct you to paragraph 3 of the first page.  
24 The first line of that says, "Bank may decline to execute a  
25 payment order for any reason." Do you see that?

1 A. Yes.

2 Q. When it's talking about a payment order, does that mean  
3 that the bank could decline incoming and outgoing payments?

4 A. Yes.

5 Q. So from 2001 through 2008, the period at issue here, M&I  
6 always had the right to stop wire transfers out of the PCI  
7 account; is that right?

8 A. Yes.

9 Q. And from 2001 through 2008, M&I always had the right to  
10 stop wire transfers coming into the PCI account; is that  
11 right?

12 A. Yes.

13 Q. Was there anyone outside of the Money Transfer Center  
14 that had the ability to stop a transfer in and out of the  
15 account?

16 A. The account officer, corporate security.

17 Q. What are -- what are some reasons that corporate  
18 security would stop a transfer in or out of a particular  
19 account?

20 A. Fraud.

21 Q. Is the compliance department part of corporate security  
22 in your understanding?

23 A. It's separate, but they're compliance also.

24 Q. Could compliance stop a transaction?

25 A. Yes.

1 Q. Are you familiar with a group called the Anti-Money  
2 Laundering Monitoring Group?

3 A. Yes.

4 Q. Would they be able to stop a wire transaction?

5 A. Yes.

6 Q. Yes?

7 Can you turn to the second page of that document.  
8 Paragraph 9 is "Miscellaneous," and 9(a) says, "Bank may  
9 terminate this service at any time with or without notice to  
10 the Customer." Do you see that?

11 A. Yes.

12 Q. Is that -- is that referring to the bank can terminate  
13 wire transfer service at any time?

14 A. Yes.

15 Q. Who at the bank could actually decide to terminate wire  
16 transfer service?

17 A. The account officer, corporate security.

18 Q. Would it be the same group that we talked about being  
19 able to stop a particular transfer?

20 A. Yes.

21 Q. During your tenure at M&I in the Money Transfer Center,  
22 do you recall any instances in which an account -- in which  
23 the bank did terminate money transfer services for a  
24 particular account?

25 A. Not specifically. I'm sure it did occur.

1 Q. Let's go back to the first page, again paragraph 3. If  
2 you go down I think six lines in the middle, there's a  
3 sentence that starts, "If an overdraft in the Account  
4 occurs."

5 A. Um-hmm.

6 Q. Do you see that?

7 A. Yes.

8 Q. So it says, "If an overdraft in the Account occurs,  
9 Customer agrees to pay Bank on demand an amount equal to the  
10 overdraft together with Bank's normal charges for overdrafts  
11 and costs of collection, including reasonable attorneys'  
12 fees." Do you see that?

13 A. Yes.

14 Q. How would an overdraft occur in the wire transfer  
15 context?

16 A. Account officer would have had to have approved the  
17 transaction and then sufficient funds not come in to cover  
18 it.

19 Q. And when you say that the account manager would have to  
20 approve it, why is that?

21 A. We would not wire out -- allow a wire to go out if it  
22 was going to overdraw the account or -- excuse me, if  
23 available funds were not there.

24 Q. We'll talk about outgoing transfers in a little bit, but  
25 is the idea that if a request for an outgoing transfer came

1 into the Money Transfer Center, if funds weren't available,  
2 the normal practice would be that the Money Transfer Center  
3 just wouldn't send that wire out; is that right?

4 A. Unless there was a specific documentation or something  
5 in place to allow that to occur.

6 Q. And unless there was account manager approval or some  
7 instruction in the record allowing that to occur, normal  
8 practice would be to not let it go out if funds weren't  
9 available?

10 A. Correct.

11 Q. And it would be only in the case of an agreement in  
12 place or instructions by the account manager that the bank  
13 would make that wire that would create a situation of an  
14 overdraft?

15 A. Correct.

16 Q. And that's what this section would be referring to,  
17 that's how an overdraft could arise in a wire transfer  
18 context?

19 A. Yes.

20 Q. Could the account manager -- well, how would an account  
21 manager go about notifying the Money Transfer Center that a  
22 particular exception needed to be made for a customer?

23 A. Phone call.

24 Q. Was anything ever put into writing?

25 A. No. It would be documented that the approval was



1       obtained.

2       Q.   And who would document that?

3       A.   That would be part of the transaction.

4       Q.   And when you say it would be documented, where would  
5       that information appear?

6       A.   I cannot say for sure.   I do not know.

7       Q.   You said earlier that it would be part of the  
8       transaction.   Was there a file associated with each  
9       transaction that that notice would appear in?

10      A.   No.   Well, I can't say.

11      Q.   So it's your testimony that some record was created that  
12      an exception was made or that approval was given, but you  
13      don't know where in M&I's records that would be notified  
14      or --

15      A.   I think it would be part of the transaction detail, but  
16      I'm not certain.

17      Q.   I'm handing you what's been marked as Exhibit 269.   It's  
18      a two-page e-mail chain Bates numbered BMO00002062.   This  
19      one starts at \_002.   And I'll direct your attention to the  
20      second page.   There's an e-mail from Aarif Leung to Ann  
21      Benson.   Are you familiar with either Aarif or Ann?

22      A.   I'm familiar with Aarif.

23      Q.   And who is Aarif?

24      A.   He worked in money transfer.

25      Q.   Did he work for you?

1 A. Yes.

2 Q. And this e-mail is from September 7, 2006. The subject  
3 is "Petters Company." And he says, "Just a reminder, please  
4 have Ed Jambor drop a memo letting us hold until account is  
5 funded for Petters Company." Do you see that?

6 A. Yes.

7 Q. Do you have any idea what Aarif is talking about in this  
8 e-mail to Ann Benson?

9 A. He wants to get approval from the officer on -- on --  
10 documented.

11 Q. And when he says, "letting us hold until account is  
12 funded," what is he talking about there?

13 A. A wire transfer that is generated that there is not  
14 sufficient funds in the account to allow it to go would stay  
15 until sufficient funds came in or -- well, that was it,  
16 sufficient funds came in right there.

17 Q. Is the situation he's talking about also referred to as  
18 daylight overdrafts?

19 A. Yes.

20 Q. And the idea, again, would be that requests wired -- or  
21 requests would be made for a transfer -- for an outgoing  
22 transfer, there wouldn't be sufficient funds in there, and  
23 so he's asking for the account manager to draw up or to  
24 record a memo that would allow that transfer to be held  
25 until funds were available?

1 A. Yes.

2 Q. Do you know how long the transfer requests could be  
3 held?

4 A. They would be held until the end of the day and then  
5 canceled.

6 Q. Is the practice that Aarif is requesting be documented,  
7 would that be different than normal Money Transfer Center  
8 policy for outgoing transfers that didn't have the funds in  
9 the account?

10 A. We didn't release a transaction unless there were funds  
11 in the account, unless the account officer gave approval.  
12 And what apparently was here was that it was in an operation  
13 that there were -- it was a need to have that done on a --  
14 not a daily basis, but a more consistent basis, so that  
15 allowed the operation or the officer not to have to call but  
16 to let us proceed.

17 Q. So the idea in having him request that from the account  
18 officer would be that in some sort of routine capacity or  
19 manner, the requests were coming in, funds weren't  
20 available, and so instead of having the account manager have  
21 to call on a regular basis, there would be a policy in place  
22 that would allow the Money Transfer Center, instead of just  
23 canceling it right away, to continue to check for funds --

24 A. Yes.

25 Q. -- through the end of the day; is that right?

1 A. Yes.

2 Q. Why did Aarif want this in writing?

3 A. Put it in the customer's file.

4 Q. And when you say "in the customer's file," was there a  
5 file for each customer executing wire transfers that was  
6 held within the Money Transfer Center?

7 A. Yes.

8 Q. And who had access to that file?

9 A. The money transfer staff.

10 Q. And when would they consult that file?

11 A. As needed.

12 Q. When you say "as needed," would that be every time that  
13 a customer requested wire activity?

14 A. No. That would be when a customer was set up, they  
15 would have their initiators and so forth established within  
16 the system per that agreement with the dollar amount, levels  
17 on, and so forth and so on. So that was there to -- to have  
18 that documentation. If there was a need to have it changed,  
19 new person initiating, it was updated. Or if something  
20 occurred with the customer that, again, wanted to have it  
21 updated, they updated it.

22 Q. And would the agreement that Aarif was asking for here  
23 be something that would be placed, along with that other  
24 documentation, in that customer file?

25 A. Right.

1 Q. So if a transfer was requested and the funds for the  
2 transfer were available, the Money Transfer Center and --  
3 would execute that request --

4 A. Yes.

5 Q. -- without checking the file; is that right?

6 A. Yes.

7 Q. If there was something unusual about that request, for  
8 example, the funds requested weren't in the account, then  
9 the Money Transfer Center would check the file to see if  
10 there was an agreement in place that would address the  
11 issue?

12 A. It would be documented, yes.

13 Q. So can you turn to the first page of that e-mail. Ann  
14 Benson sends to Ed Jambor five days later an e-mail. She  
15 tells him to clean this up and e-mail it to Aarif. And in  
16 it she says, "Unfortunately Aarif, Ed left on vacation  
17 starting today and won't be back until Monday. I guess he  
18 never had a chance to get that memo written, although I did  
19 nag him about it yesterday."

20 She goes on and says, "In his absence, allow me to  
21 relay to you in writing the policy that he follows regarding  
22 outgoing Petters wire transfers is that if the funds are not  
23 available, if funds are not available in any Petters  
24 accounts at the time the wire is initiated by the customer,  
25 will the MTC please continue to check the account for

1       availability throughout the end. If the funds never become  
2       available that day, the MTC may cancel the wire transfer  
3       request and do not need to contact the customer." Do you  
4       see that?

5       A. Yes.

6       Q. In this e-mail, Ms. Benson references funds not being  
7       available in any Petters accounts. Is it the case that the  
8       Money Transfer Center could look to various accounts in a  
9       customer's name in order to satisfy the -- in order to fund  
10      a wire request?

11      A. Yes.

12      Q. So if a customer had associated with it a certain  
13      person, like Tom Petters, for example, and Petters had  
14      multiple accounts at M&I, it would be normal practice for  
15      the bank, if there were not funds in the PCI account, for  
16      example, to look to another Petters account to satisfy the  
17      funding for a transfer request?

18      A. If the account officer wished to have that occur.

19      Q. So the account officer could make that request?

20      A. Yes.

21      Q. If that -- if the account officer didn't make that  
22      request, would the Money Transfer Center automatically look  
23      for other accounts associated with a particular customer?

24      A. No.

25      Q. When -- she also references in here this idea of the

1 Money Transfer Center continuing to check the account for  
2 availability throughout the end -- and I think we talked  
3 about this earlier. That would be a different practice than  
4 the Money Transfer Center would usually engage in if it  
5 didn't have this instruction, the idea of checking  
6 throughout the day, correct?

7 A. Correct. That would be a specific instruction from the  
8 account management.

9 Q. If there wasn't a specific person associated with the  
10 Petters Company, Inc. account, how would you determine who  
11 in your department would be responsible for checking the  
12 account throughout the day in accordance with this policy?

13 A. We had people monitoring an exception queue. They would  
14 look at it periodically.

15 Q. If a -- if the funds didn't become available, would the  
16 Money Transfer Center reach out to the customer to inform  
17 them that the transfer didn't go through?

18 A. Yes.

19 Q. How was that done?

20 A. Phone.

21 Q. Who in your department would make that phone call?

22 A. It would be a small group of people that -- you're  
23 asking for names. I don't have -- I can't give you specific  
24 names.

25 Q. When would that phone call be made?

1 A. It could be made any time during the day. Obviously at  
2 the end when it is going to be a done deal, it is going to  
3 be made.

4 Q. The IRS memo that we looked at first --

5 THE COURT: Let's take a break now.

6 Members of the Jury, please remember the  
7 instructions that I have given you, and do not discuss the  
8 case, do not do any research, do not encounter anyone  
9 involved in the case during the course of this recess.  
10 Let's plan to return at ten minutes after 11:00. Okay?

11 (Jury excused)

12 **IN OPEN COURT**

13 **(JURY NOT PRESENT)**

14 THE COURT: We are in recess.

15 MR. ANTHONY: Thank you, Your Honor.

16 THE COURT: You're welcome.

17 (Recess taken at 10:55 a.m.)

18 \* \* \* \* \*

19 (11:14 a.m.)

20 **IN OPEN COURT**

21 **(JURY PRESENT)**

22 THE COURT: Are we ready to resume?

23 MR. COLLYARD: Yes, Your Honor. Thank you. We'll  
24 continue playing the videotape disposition.

25 THE COURT: Very well. Thank you.



1 BY MR. MOHEBAN:

2 Q. The IRS memo that we looked at first, you don't have to  
3 pull it out, but that's what I'm talking about here, made  
4 reference to a customer identifying authorized individuals  
5 that can conduct transaction and create a personal  
6 identification number to be used with the request. How did  
7 that PIN system work?

8 A. The person's name was entered within the money transfer  
9 system along with the PIN that they could use to authorize a  
10 transaction, along with the parameters. So when a person  
11 would call in, they would give their PIN number. They would  
12 be allowed to initiate a wire transaction up to the amount  
13 of or whatever the parameters were that had been put in  
14 place.

15 Q. And I'll direct you back to Exhibit 268, please, and  
16 specifically to the page at the bottom ends in 674. Do you  
17 have it in front of you?

18 A. Yes.

19 Q. And on here there's listed three people -- the first one  
20 is crossed out -- listed as initiators. Do you see that?

21 A. Yes.

22 Q. What -- what is "initiators" referring to?

23 A. That means people that could initiate a wire transfer.

24 Q. And next to them are listed some dollar limits. There's  
25 "Repetitive Dollar Limit" and "Nonrepetitive Dollar Limit."

1 Do you see that?

2 A. Yes.

3 Q. Are those the limits that you were referring to when you  
4 talked about limits for an authorized user?

5 A. Yes.

6 Q. And in this case, the limits for the three people is \$10  
7 million. Do you see that?

8 A. Yes.

9 Q. There's also in there a "Bank Use Reference Code" listed  
10 at the far right. Do you know whether those are the PIN  
11 numbers?

12 A. I believe they are.

13 Q. So when a person was requesting a wire via telephone, he  
14 or she would give their PIN number as part of the  
15 authorization; is that right?

16 A. Yes.

17 Q. And they would also give the account number that they  
18 wanted the transfer to come from; is that right?

19 A. Yes.

20 Q. All right. Can you turn back to Exhibit 267.

21 Paragraph 3 says, "PCI's outgoing wires were done by phone  
22 with the calls going directly to the wire department in  
23 Milwaukee." Do you see that?

24 A. Yes.

25 Q. I want to show you this. This exhibit has been marked

1 as 271. It's Bates labeled BMO00001869\_002. Note that part  
2 of this exhibit is an attached spreadsheet that you can see  
3 on the first page. I've got a document placeholder there at  
4 BMO1870, and then there's a spreadsheet printout, which is a  
5 truncated version of the spreadsheet which counsel has  
6 actually provided. We're not going to get into all the  
7 details, but part of what I wanted to ask about was the  
8 meaning of these headings across the top.

9 And yesterday your counsel provided a worksheet  
10 that gives an explanation of the column headings. So that's  
11 marked as 272. And we'll kind of use these in tandem.

12 Did you play a role in helping provide information  
13 about the column headings as characterized or as provided  
14 here in Exhibit 272?

15 A. Yes.

16 Q. Yes?

17 Where -- where did the information in this  
18 spreadsheet come from? I'm sorry. Going back to  
19 Exhibit 271.

20 A. Well, it's all part of a money transfer transaction,  
21 either incoming or outgoing.

22 Q. Right. When -- when people that work for you pulled  
23 that information in response to the government subpoena in  
24 September 2008, where were they pulling that information  
25 from?

1 A. I'm guessing it was online.

2 Q. And when you say you're guessing online, do you have any  
3 sense of where online they were finding that information?

4 A. In the history of the money transfer intranet system.

5 Q. And so the particular system that they were accessing  
6 would have been the money transfer intranet system --

7 A. Yes.

8 Q. -- that you referenced earlier?

9 A. Right.

10 Q. And that's, again, something that the money transfer  
11 department could log into via an icon on their desktop to be  
12 able to see the transactions for a particular account?

13 A. Yes.

14 Q. Could -- what were the -- what were the search  
15 capabilities of that system? Could, for example, you  
16 isolate a particular account number and look for all wire  
17 activity for that customer?

18 A. You could sort by, yes, different criteria.

19 Q. Would that intranet that you're talking about contain  
20 only information about wires?

21 A. Yes, only wires.

22 Q. And one of the -- would this be the place that you would  
23 go to look if you wanted to see how a transfer was  
24 initiated?

25 A. Yes.

1 Q. And so if we look at Column D, which is "LOC," on the  
2 description in 272 it says -- it's provided as "Location of  
3 Wire Origination." And "MTRANS" is Money Transfer Center?

4 A. Yes.

5 Q. Yeah. So when "MTRANS" is listed --

6 A. Uh-huh.

7 Q. -- does that mean that it was a wire transfer -- an  
8 outgoing wire transfer?

9 A. It was initiated in the wire transfer department.

10 Q. And as opposed to a wire transfer that was an incoming  
11 wire which would not have been initiated?

12 A. Correct. Yes.

13 Q. So is it fair to say that whenever "MTRANS" appears in  
14 "Location," that would be a wire that PCI had initiated  
15 through the Money Transfer Center?

16 A. Yes.

17 Q. Okay. Thanks for the clarification.

18 How would people outside of the Money Transfer  
19 Center be aware of a reason to cancel a particular wire?

20 A. Corporate security, because of something unlawful that  
21 is occurring with the customer, and that would be the first  
22 thing that comes to mind.

23 OFAC, you know, or anybody that's aware of a  
24 particular instance -- or not instance, but set of  
25 circumstances that could cause -- or that they want to have

1 a transaction stopped or transactions stopped.

2 Q. Would people outside of your department, outside of the  
3 Money Transfer Center, rely on the Money Transfer Center to  
4 notify them that there was an exception that they should be  
5 looking at?

6 A. They would not -- no.

7 Q. So if they weren't relying on people in the Money  
8 Transfer Center, how are they getting the information that  
9 something untoward is going on that requires them to come in  
10 and cancel?

11 A. They would be aware of a customer that was using wire  
12 transfer services maybe and that customer was now involved  
13 in fraud or some other event, they would then -- they would  
14 not just go to money transfer and shut it down, they would  
15 also -- or not shut it down, but, you know -- they would  
16 also go to checking accounts and cancel or have all checks,  
17 you know, whatever, looked at, reviewed. I mean, I'm not  
18 going to tell you what they are going to do, but they would  
19 stop that operation or slow it up or monitor it or  
20 something.

21 Q. So is it right that what -- the situations you're  
22 talking about would be related to something about a  
23 particular customer has been flagged by corporate security  
24 or compliance, and as part of their investigation, they  
25 could go to the Money Transfer Center and stop wires?

1 A. Yes.

2 Q. Would that also extend to their knowledge of particular  
3 wires? So not just the customer that did it, but would  
4 something about a wire ever flag for them that they would  
5 come in and stop that particular wire?

6 A. Not that I'm aware of.

7 Q. All right. So before we broke, we were -- we started  
8 talking about the spreadsheet attached to the Glanner e-mail  
9 at 1870, and I gave to you an excerpt of that. I think it's  
10 just 15 pages. But the spreadsheet itself has more than  
11 23,000 entries on it. Your counsel has actually produced a  
12 copy. It's sitting next to you. It's about an inch and a  
13 half, two inches thick.

14 In preparation for today's deposition, have you  
15 reviewed that spreadsheet at all?

16 A. Yes.

17 Q. Are you aware in your time at M&I of other noncommercial  
18 customers that engaged in that level of wire activity?

19 A. No.

20 Q. I'm handing you what's been marked previously as  
21 Exhibit 16. I think that was from Flynn. And it's a  
22 compilation of pages that on the top says, "Transaction  
23 Detail Report." Do you see that?

24 A. Yes.

25 Q. Do you know where -- are you familiar with Transaction

1 Detail Reports?

2 A. Yes.

3 Q. Where did Transaction Detail Reports come from?

4 A. The money transfer system.

5 Q. How were Transaction Detail Reports generated?

6 A. You could request one through a terminal, online access.

7 Q. And who could make that request?

8 A. Appropriate people in the money transfer department.

9 Q. Do you know whether people in the risk department could  
10 request them as well?

11 A. I believe they could.

12 Q. What was the purpose of generating a Transaction Detail  
13 Report?

14 A. If you wanted to review the transactions for a purpose.

15 Q. Were Transaction Detail Reports ever shared with  
16 customers?

17 A. To my knowledge, no.

18 Q. Were they ever shared with account managers?

19 A. Possibly.

20 Q. Could an account manager request to see a Transaction  
21 Detail Report for a particular transaction or a period of  
22 time?

23 A. Yes, they could.

24 Q. And how would an account manager go about making that  
25 request?



1 A. Phone call.

2 Q. Phone call to the Money Transfer Center?

3 A. Right.

4 Q. And could a -- could an account manager make that  
5 request for any reason?

6 A. Yes.

7 Q. Would there be any reason that the Money Transfer Center  
8 would not give the Transaction Detail Report to the account  
9 manager?

10 A. No.

11 Q. And within the Transaction Detail Report, at least on  
12 page 1 in Exhibit 16, there's information about the party  
13 sending the wire and the party receiving the wire; is that  
14 right?

15 A. Yes.

16 Q. The originator and the beneficiary; is that right?

17 A. Yes.

18 Q. There's also listed on there the send date; is that  
19 right?

20 A. Yes.

21 Q. And the amounts of the transfer?

22 A. Yes.

23 Q. And then "TRN," is that transaction number?

24 A. Yes.

25 Q. Would each transaction be given a unique identifying

1 number?

2 A. Yes.

3 Q. And that's what the transaction number would represent?

4 A. Yes.

5 Q. Was there any other way that an account manager would be  
6 notified about wire transfer activity such that the account  
7 manager would be able to call the Money Transfer Center to  
8 make an exception request?

9 A. Could you state that again?

10 Q. Yeah, I'm sorry. I'm just -- I'm driving at this. We  
11 know that Ed Jambor, for example, contacted the Money  
12 Transfer Center with information about a policy that he  
13 wanted in place for the PCI account, right? That's what we  
14 looked at in the e-mails --

15 A. Right.

16 Q. -- with Aarif, correct?

17 A. Right.

18 Q. How would Ed Jambor know that the wire activity of  
19 Petters requesting outgoing wires, that there weren't funds  
20 to cover those wires, was happening frequently enough to  
21 actually make that request?

22 A. Because there was probably daily contact with regard to  
23 those transactions not being processed or processed timely,  
24 and they were looking for a way to accelerate that.

25 Q. And when you say "daily contact," what form would that

1 take?

2 A. It could have been a -- initially a call to the account  
3 officer, and then the account officer would -- because the  
4 account officer could give approval and -- you know, to do  
5 it; or if they did not want to do it, they could go to their  
6 customer and look for a way or find a way to make it work  
7 that they and the loan committee would be comfortable with.

8 Q. So the idea would be that if a situation that was  
9 creating an exception was occurring, the Money Transfer  
10 Center would try to find a way to resolve that, and one of  
11 the ways would be to reach out to an account manager for a  
12 particular account?

13 A. We probably would be dealing with the account manager,  
14 and it would be a lot of contact, and the account manager  
15 would not want to have that contact either. We're used to  
16 that contact, but it's, you know -- the people we're calling  
17 or communicating with would be looking for a way to resolve  
18 that issue and make it less.

19 Q. And -- sorry.

20 And one way of resolving to -- well, resolve the  
21 issue because they didn't want those phone calls coming  
22 in --

23 A. Correct.

24 Q. -- all the time, right?

25 And one way to resolve it would be to put a policy

1 in place, like the one that we looked at earlier, in which  
2 Mr. Jambor e-mailed Aarif with that policy, correct?

3 A. Yes.

4 Q. And what you're telling me is that one of the ways that  
5 Mr. Jambor could have been alerted is that people within  
6 your department would have reached out to him to try to work  
7 through an exception --

8 A. Yes.

9 Q. -- including an exception that was occurring routinely,  
10 correct?

11 A. Yes. And we normally would not be dealing with a  
12 customer unless the account officer was involved as a matter  
13 of just courtesy. It's their account, therefore, they  
14 should have some knowledge of it.

15 Q. I understand.

16 And would calling that account manager by phone be  
17 a normal way of contacting the officer?

18 A. Yes.

19 Q. Would there also be e-mails?

20 A. Possibly, yes.

21 Q. In fact, with the case of Aarif, we saw that Aarif  
22 reached out to Ann Benson to be in touch with the account  
23 manager, correct?

24 A. Yes.

25 Q. Let's go back to the spreadsheets, Exhibit 271, and then

1       also the explanation sheet on 272. So we talked about --  
2       sorry.

3       A. Okay.

4       Q. We talked about Column D, which was LOC. And the next  
5       one I want to ask about is Column G, which is "Tran Type,"  
6       and the column description listed here is "Transaction  
7       Type," correct?

8       A. Yes.

9       Q. The next one I want to look at is Column H, which is  
10      "SRC Code," which is described as "Source Code," correct?

11      A. Correct.

12      Q. What is -- and there are various codes in here that  
13      we'll talk about, but, in general, what is source code  
14      signifying?

15      A. How the wire was initiated.

16      Q. Okay. So one of the source codes is "FED," which listed  
17      here -- is explained here as "Incoming Wire Sent Through  
18      Fedwire." Can you explain what that means.

19      A. That means we received the wire from the federal wire  
20      system.

21      Q. And the federal wire system, can you explain that to me,  
22      please.

23      A. If a bank wants to send us a transaction for one of our  
24      customers, they send it to Fed, but it's got our bank number  
25      on it and it would go to Fed and then come to, in this case

1 M&I. We, in turn, would post it to the account that is  
2 indicated on there.

3 Q. And the appearance of "FED" would be associated with  
4 incoming wires made to the PCI account for the spreadsheet,  
5 correct?

6 A. Yes.

7 Q. The next one is "LTC," which is explained as "Wire  
8 Originated From Branch, Requires Callback." Can you explain  
9 what that means.

10 A. That means that the wire -- that somebody walked into a  
11 branch, initiated a wire and it was called in or otherwise  
12 initiated from the branch. And we do a callback to verify  
13 that it is correct.

14 Q. What does it mean when you say you do a callback? Who  
15 are you calling back?

16 A. Calling back the branch that -- the initiator.

17 Q. When we -- I think we touched on this a little bit  
18 earlier, but when a wire is coming from a branch, would that  
19 mean that a customer is going in, finding their account  
20 manager, and then the account manager is calling the Money  
21 Transfer Center?

22 A. It could be as simple as you, as just a regular retail  
23 customer, going in there wanting to wire funds to your -- to  
24 your brother in Pittsburgh. That's -- so you don't have,  
25 necessarily, an account manager.

1 Q. Okay.

2 A. You've got somebody that is initiating by going to a  
3 counter person or an officer and making the request.

4 Q. I understand. So the distinction you're drawing is that  
5 we can't say for sure that it was the account manager making  
6 that call, but it was someone within a branch that was  
7 making the call --

8 A. Correct.

9 Q. -- on behalf of the customer?

10 Again, what's the purpose for the callback?

11 A. Verify authenticity.

12 Q. And how would that be verified?

13 A. By talking with the person that initiated it at that  
14 branch.

15 Q. On the -- on the big spreadsheet in 1870, there were 15  
16 entries -- 15 entries for LTC. Does that mean that there  
17 were 15 instances in which PCI initiated a wire transfer by  
18 going into a branch?

19 A. I did not specifically look at those, but I would say  
20 yes.

21 Q. Okay. The next entry is "LTR," which is explained as  
22 "Wire Originated From Branch, No Callback Required." Do you  
23 see that?

24 A. Yes.

25 Q. What does that mean?

1 A. It would be a wire that was set up already. In other  
2 words, it was a normal routine wire that was done. So the  
3 callback was not necessary because it was anticipated and  
4 was part of the normal process.

5 Q. How would a wire be part of the normal process?

6 A. The customer and the account officer and the branch,  
7 they had gotten together and that's how they wanted to do  
8 it.

9 Q. And the distinction between that and LTC is that because  
10 they were all together, it was planned --

11 A. Yes.

12 Q. -- in the LTR case and therefore had some higher level  
13 of understood authenticity --

14 A. Correct.

15 Q. -- is that fair?

16 A. Yes.

17 Q. Whereas, the LTC in some way was not expected and thus  
18 required a callback for verification?

19 A. Yes.

20 Q. So there are, again, in the big spreadsheet 458 examples  
21 in which LTR is listed. Those would be representative of  
22 times in which PCI and the account manager got together to  
23 initiate a wire that was planned in some way such that a  
24 callback wasn't required?

25 A. Correct.



1 Q. And then the last one, last entry is "PHN," which is  
2 "Wire Originated Through Customer Call to the Money Transfer  
3 Center." Do you see that?

4 A. Yes.

5 Q. Can you describe what that is describing.

6 A. That would be a customer that has a PIN. They would  
7 call the money transfer system and they would initiate a  
8 transaction that was associated with -- an account that is  
9 associated with that PIN and -- so it was a phone  
10 initiation.

11 Q. So in the big spreadsheet of 1870, there are more than  
12 10,700 examples of "phone" being provided in the source  
13 code. Those would all be listing -- they would be records  
14 of wires that PCI initiated by calling the Money Transfer  
15 Center and providing their PIN to initiate a wire transfer;  
16 is that correct?

17 A. Yes.

18 Q. The next column is "ADV Type," which in the column  
19 description is described as "Type of Advice." What does  
20 "type of advice" mean?

21 A. This is K?

22 Q. I.

23 A. I. Oh, this is how the customer is notified that the  
24 transaction has been completed or will be notified how the  
25 transaction -- "LTR" means complete -- "LTR" stands for

1 letter. Provide the customer with notification and  
2 that's --

3 Q. Okay. So you talked about LTR. So LTR would be a  
4 physical letter sent out to a customer telling them that  
5 they had received an incoming wire; is that right?

6 A. That would be the statement, yes.

7 Q. And this is a statement, that we had discussed earlier,  
8 that someone in your department was responsible -- let me  
9 say: Was someone in your department responsible for  
10 drafting it and getting it to the mailroom to send out?

11 A. Right. Yes.

12 Q. What about the last entry, which is "SWF"?

13 A. It's SWIFT.

14 Q. What does "SWIFT" signify?

15 A. That's -- again, it's an acronym for the Society for  
16 Worldwide Interbank Financial Transactions. They are  
17 international transactions.

18 Q. So if "SWIFT" is noted under "Type of Advice," do you  
19 read that as denoting that an international transfer --

20 A. Yes.

21 Q. -- was either made or received?

22 A. Made.

23 Q. Made.

24 A. I can't say for sure how incoming SWIFT would have been  
25 notified.

1 Q. For the remainder of the column headings and  
2 descriptions, is it your testimony today that the column  
3 descriptions contain the meaning of those column headings to  
4 the best of your understanding and the understanding of  
5 those that you worked with in putting together this sheet?

6 A. Yes.

7 Q. We can set that aside.

8 Can I turn your attention back to Exhibit 268,  
9 please. This is the Wire Transfer Agreement packet. I'll  
10 direct you to the fourth page, which ends in 672 on the  
11 become.

12 At the top it says, "Addendum 1 to Wire Transfer  
13 Agreement, Notification of Wire Transfers [sic]." Do you  
14 see that?

15 A. Yes.

16 Q. And, again, the customer listed here is Petters Company,  
17 Inc., right?

18 A. Yes.

19 Q. A few lines down there's a bolded and underlined heading  
20 that says, "Required Mailing address." Do you see that?

21 A. Yes.

22 Q. And it says, "Bank will send notification of both  
23 incoming and outgoing wire transactions as follows:" And  
24 there's an address listed there for Petters Company, Inc.,  
25 right?

1 A. Yes.

2 Q. So we talked about the notification via letter of  
3 incoming wires. Is it your understanding, based on this  
4 sheet, that M&I was sending notification via letter to  
5 Petters Company about outgoing wires as well?

6 A. Yes.

7 Q. Do you know the process by which M&I sent confirmation  
8 of outgoing wires to PCI?

9 A. They would have mailed the appropriate information to  
10 them.

11 Q. And would someone in your department have been  
12 responsible for compiling the information that someone in  
13 the mailroom would ultimately mail to Petters Company?

14 A. Yes, accumulating it. It would be system generated.

15 Q. And when you say it would be system generated and  
16 someone in your department would accumulate it, what does  
17 that mean?

18 A. It means they would -- it would be -- for that  
19 particular account it would be taken to the mailroom and  
20 they would, in turn, mail it.

21 Q. And when you say "system generated," does that mean that  
22 it was -- the information was coming from the money transfer  
23 intranet or from Trail and then would be collected by  
24 someone in your department and taken to the mailroom?

25 A. Yes. It would be part of the end-of-day process.

1 Q. And so this would be something that was done for every  
2 day in which a wire transfer was made?

3 A. Correct.

4 Q. Or -- yeah, okay.

5 Underneath the section that we looked at, there's  
6 a line that starts, "Optional Incoming Wire Transaction  
7 Notification." It says, "In addition to the mail  
8 notification, customer may also receive notice of incoming  
9 wire transactions via fax or phone call for an additional  
10 fee." Do you see that?

11 A. Yes.

12 Q. And right here the box is checked for "Fax  
13 Notification - List Attention Name and Fax Number." Do you  
14 see that?

15 A. Yes.

16 Q. And listed there is "Deanna Munson," which is crossed  
17 out, and then "Coleman" is put in and a fax number, right?

18 A. Yes.

19 Q. What do you understand that box being checked and  
20 information provided to mean?

21 A. Well, that would indicate to me that the customer wanted  
22 to be notified of the specific transactions as they came in,  
23 and the best way to do it would be to fax a copy of the  
24 transaction as it came in because that would provide the  
25 detail.

1 Q. And so is it your understanding that as of the date of  
2 this addendum -- and I guess there's a "Received" stamp here  
3 of February 14th, 2006 -- that Petters Company had requested  
4 that it receive, in addition to letter confirmation, that it  
5 receive fax confirmation or fax notification of incoming --

6 A. Yes.

7 Q. -- wire transactions?

8 A. Yes.

9 Q. Mr. Neufeldt, I am showing you what was previously  
10 marked as Lindstrom Exhibit 5. It's a collection of faxes  
11 that starts at Bates number BLT0540737. Are you familiar at  
12 all with the format of the faxes in this -- in this exhibit?

13 A. Just what I see here.

14 Q. Have you ever seen a fax like this before?

15 A. Yeah. Yes.

16 Q. You'll note that, if you look across the top of the  
17 various pages, there's a header that contains a date and  
18 time and reference to the "M&I Bank Money Transfer  
19 Department Via VSI-FAX." Do you see that?

20 A. Yes.

21 Q. Do you understand this to mean that these are faxes sent  
22 by the money transfer department?

23 A. Yes.

24 Q. At M&I?

25 A. Yes.

1 Q. And you see that there are different times on the  
2 various faxes even though they're all dated January 11th and  
3 that towards the end, next to "VSI-FAX," it says "Page 1 of  
4 1" on these various sheets; do you see that?

5 A. Yes.

6 Q. Do you understand that to mean that these were not sent  
7 all as one batch, but were, in fact, sent at different times  
8 to the customer, PCI?

9 A. Yes.

10 Q. Are these examples of the fax confirmations sent to PCI  
11 confirming incoming wire transfers received?

12 A. Yes.

13 Q. Some of the information in here we've talked about  
14 through reference to Exhibit 1870. Under "Payment  
15 Information" there are some different entries. Some say per  
16 a number instruction from -- others on page 5, for example,  
17 list PAC 598. Do you know where the entries or the  
18 information listed under "Payment Information" comes from?

19 A. We're in this one right now?

20 Q. Yeah, sorry, still in there.

21 A. PAC598?

22 Q. Yep. And you can compare that to the first page, which  
23 has "Payment Information," and it's listed "Per 11107  
24 Instruction From." Do you know where the text underneath  
25 that "Payment Information" box came from?

1 A. No.

2 Q. Would that have been something entered by your  
3 department?

4 A. Yes. I would say it would be something that was  
5 available within the money transfer system and that you  
6 could fax it.

7 Q. Do you have an understanding of how the information  
8 contained in the rest of this fax was populated?

9 A. No.

10 Q. Do you know whether there was someone in your department  
11 responsible for manually entering this information and then  
12 manually sending each fax to PCI once an incoming transfer  
13 came in?

14 A. I do not know.

15 Q. Do you know -- well, did the Money Transfer Center have  
16 any mechanism by which faxes could be automatically sent to  
17 customers upon receipt of an incoming wire?

18 A. I believe we did. It was not a very highly used method  
19 of notification.

20 Q. So your testimony today is that you believe that your  
21 department potentially had access to an automated system of  
22 sending fax confirmations, but you can't be sure that these  
23 faxes were not sent manually?

24 A. Can't be sure, but I would -- I would say that they were  
25 sent via automated.



1 Q. If they were sent via automated, how did that -- how did  
2 those faxes get sent, how did that process occur?

3 A. It would have been the link from the money transfer  
4 system to the automated system.

5 Q. When you say it would be a link, do you mean a link that  
6 someone in your department would click on to send it or the  
7 information would link the information contained in the  
8 money transfer system to the fax system and provide that  
9 information to it?

10 A. I can't say for sure.

11 Q. We've talked about sort of the nuts and bolts of the  
12 incoming wire process. I'd like to walk through now the  
13 process of a typical transaction for an outgoing wire in the  
14 PCI account between 2001 and 2008.

15 To start, do you know whether it would have been  
16 largely the same process if the vast majority of those  
17 originating wires was taking place via phone throughout that  
18 period? I'm sorry. Confusing question.

19 If PCI was originating wires, by and large, given  
20 the numbers, by telephone from 2001 through 2008, would that  
21 process have looked the same throughout that entire period?

22 A. Yes.

23 Q. And how would PCI start the process of wiring money to  
24 someone else?

25 A. A phone call.

1 Q. Who would that phone call go to?

2 A. It would come into the Money Transfer Center and then it  
3 would go through a random -- you know, who's available.

4 Q. So someone from PCI could call in. Would that someone  
5 have to be listed on the Wire Transfer Agreement as an  
6 authorized user?

7 A. Yes. They'd have to have the name and PIN.

8 Q. So a person could call in from PCI as long as he or she  
9 was an authorized user and had a PIN, and he or she would  
10 call to the Money Transfer Center in Milwaukee, correct?

11 A. Right.

12 Q. Would the person from Petters leave a message or were  
13 they talking to a live person at the Money Transfer Center?

14 A. They were talking to a live person.

15 Q. So PCI calls the Money Transfer Center. They talk to  
16 one of a random group of authorized people within your  
17 department. They give their name and their PIN number.  
18 What other information would they need to provide in order  
19 to originate a transfer?

20 A. Well, if they were -- if it's one that they normally did  
21 and they had it set up as a repetitive, they would give the  
22 repetitive code and then the dollar amount.

23 Q. Okay. We'll talk about repetitive in just a minute.

24 If it wasn't one that they had set up, what other  
25 kind of information would they have to give?

1 A. Then we would have to have all the appropriate  
2 information: bank, name, account -- bank account number,  
3 name, all the various things.

4 Q. I'm handing you what's been marked as Exhibit 273. I'll  
5 have a few specific questions, but I'll represent that the  
6 first page -- actually, I think just about all of them has  
7 either reference to a Repetitive Transfer Form or an  
8 addendum to the Wire Transfer Agreement that is Repetitive  
9 Transfer Requests. Do you see that?

10 A. Yes.

11 Q. What's the significance of a Repetitive Transfer Form or  
12 a Repetitive Transfer Request?

13 A. It allowed for the efficient and accurate entry and  
14 sending of a wire because you would have all the information  
15 that the customer wanted out there. There was no keying  
16 errors because you had it within the system as a repetitive,  
17 and it could be done relatively fast and accurate.

18 Q. So if we see here that -- for Petters Company, Inc.  
19 there's a date on the first page that's December of 2005.  
20 So as of that date Petters Company, Inc. had designated the  
21 various entities listed on these pages as regular recipients  
22 of funds from them; is that right?

23 A. Yes.

24 Q. And the idea is that they would complete these forms in  
25 order to help expedite the wire process because they could

1 call in, reference a code instead of having to provide all  
2 the information to you?

3 A. Right. If I'm not mistaken, there was a financial  
4 benefit also because repetitive was a less costly  
5 transaction for banking purposes, and that cost was made  
6 available to the customer. It made us more efficient and  
7 therefore was...

8 Q. So M&I incited customers to complete Repetitive  
9 Transfer Forms because it was a less costly process for  
10 them?

11 A. Exactly.

12 Q. And so that was -- do you know who would convey that to  
13 the customer?

14 A. That would be the account officer would suggest that or  
15 encourage that.

16 Q. How would the account officer know that there was a type  
17 of volume of wires or a regular group of recipients of wires  
18 such that repetitive transfers made sense?

19 A. They would see the account analysis, if you will, of the  
20 customer relationship with the bank and they could look at,  
21 you know, all the various volumes for how many checks  
22 cleared, how many deposits were made, how many wires came  
23 in, how many wires came out, and they could see what was  
24 there.

25 Q. If you moved forward in this -- in Exhibit 273 four

1 pages to the page ending in 765, there is a Repetitive  
2 Transfer Request to an entity with U.S. Bank as its  
3 receiving bank and the beneficiary is listed as PC Funding,  
4 LLC. Do you see that?

5 A. Yes.

6 Q. There's not an address or city, state, and ZIP listed  
7 for PC Funding. Do you see that?

8 A. Correct.

9 Q. Although for both, in parentheses, it says "Required."  
10 Do you know why there's not an address listed for that  
11 particular entity?

12 A. No, I do not.

13 Q. Would the Money Transfer Center complete a transfer to a  
14 repetitive transfer entity that didn't have that information  
15 completed?

16 A. I cannot say.

17 Q. Were you allowed to -- was the Money Transfer Center  
18 allowed to complete a wire transfer to an entity for which  
19 it didn't have address, city, state, ZIP code, country  
20 information?

21 A. I'm sure there would have been circumstances that it  
22 would have been allowed.

23 Q. Do you know what those circumstances are?

24 A. Customer did not have an address at the bank.

25 Q. Wasn't a recipient address required in order to comply

1 with OFAC procedures, for example?

2 A. I do not know.

3 Q. All right. So let's go back to the overall process of  
4 originating a wire transfer.

5 THE COURT: Let's take a break now. This is a  
6 good time.

7 So, Members of the Jury, please remember our  
8 recess instructions and continue to follow them. We will  
9 take our break now for lunch, and please be prepared to come  
10 back to the courtroom at 1:00. Okay? Have a good lunch.

11 (Jury excused)

12 **IN OPEN COURT**

13 **(JURY NOT PRESENT)**

14 THE COURT: You may be seated. I just want to  
15 address some housekeeping matters. Are there issues that  
16 need to be addressed now?

17 MR. MARDER: There is, Your Honor, regretfully.  
18 There's an issue that arose this morning that I wanted to  
19 address with the Court. We can wait until after you raise  
20 your housekeeping matters.

21 THE COURT: No. This is exactly what I wanted to  
22 use this time for.

23 MR. MARDER: Your Honor, you recall this morning  
24 there was some testimony about this DACA agreement.

25 And here my understanding of the facts, and I'm

1       sure counsel for the defendants can correct me if I'm wrong,  
2       but this document did not exist in BMO's files. It was  
3       apparently destroyed and was never produced by BMO.

4               It was marked as an exhibit at a deposition in  
5       another case, in the Palm Beach case; and when they received  
6       it as a deposition exhibit, they put their Bates number on  
7       it and produced it, but it didn't come from their files.

8               This morning Mr. Moheban asked a series of  
9       questions to the witness regarding this document, trying to  
10       suggest that BMO did not destroy it because here it was in  
11       black and white and it had their Bates number on it, trying  
12       to suggest that they actually produced this document from  
13       their files. And by any stretch of the imagination,  
14       Your Honor, this line of questioning was misleading.

15              And I raise it now for three reasons:

16              First of all, Your Honor, you have ruled that the  
17       Court can't put counsel on the stand. And the only way for  
18       us to rebut this misleading line of testimony is to put  
19       counsel on the stand and explain that this document was  
20       destroyed and not produced.

21              Second of all, if you're not inclined to do that,  
22       Your Honor, we would at least request a curative instruction  
23       to the jury that this document was not produced by BMO from  
24       its files, that they obtained it from a third party, and  
25       that their copy was destroyed.

1           And, finally, Your Honor, setting aside the issue  
2           of counsel testimony, it's still an open issue as to whether  
3           we can bring up the conduct of opposing counsel in  
4           connection with the spoliation issue because Your Honor has  
5           not ruled on that portion of it.

6           And we would just like to bring this issue to the  
7           Court's attention because it's certainly relevant in that  
8           the Court should be considering whether we should take issue  
9           with opposing counsel's conduct given the ongoing nature of  
10          the representations made with regard to document  
11          destruction.

12           THE COURT: Thank you, Counsel.

13           MR. MOHEBAN: Your Honor, Mr. Marder injected this  
14          issue with a witness who had no knowledge about the subject  
15          matter. He brought this up and made without any support --  
16          and he's provided no support today for the allegation that  
17          this was document was destroyed.

18           I was simply rebutting the evidence that he -- the  
19          innuendo that he had submitted with respect to the fact that  
20          he had submitted to the witness a document that had no Bates  
21          number on it and suggested, I think because of that, that  
22          somehow they had gotten it from some other origin. We don't  
23          know where that came from, but it appears that it was just  
24          their Exhibit 3 that they had enlarged to delete the  
25          reference to the Bates number.



1           So my response to that was to simply point out  
2           from their own exhibit list that they have a document that  
3           had -- that exact same document that has an M&I Bates number  
4           on it.

5           So I don't think Mr. Marder can come up here and  
6           say the documents were destroyed. And this witness was not  
7           a knowledgeable witness on the subject. It was just a fair  
8           response to an unsupported allegation that was made by  
9           Mr. Marder.

10           MR. MARDER: Your Honor, I have here the  
11           transcript from the Palm Beach deposition, which indicates  
12           that this particular document, which was marked as  
13           Exhibit 11 at that deposition, was not produced by BMO and,  
14           in fact, BMO asked Palm Beach to produce it.

15           The idea that they didn't destroy the document is  
16           preposterous given that they have never produced it in this  
17           case and the only version they have produced is the document  
18           that someone else gave them at a deposition. So it is clear  
19           that this document was not produced by BMO. There is no  
20           factual dispute over that.

21           And these questions this morning directed to the  
22           witness asking him whether the fact that there's an M&I  
23           production number on the document indicates that BMO didn't  
24           destroy it were grossly misleading, and that's why we seek  
25           the requested relief.

1 MR. MOHEBAN: Again, I would just point out not  
2 only with respect to that document, but also the attempt to  
3 claim that Mr. Flynn had altered documents -- I mean, let's  
4 keep in mind that the spoliation allegations that have been  
5 addressed by this Court have to do with this server,  
6 system-wide server issue. And then there's a secondary  
7 issue regarding documents in 2014.

8 These have never been -- they've never argued, to  
9 my knowledge, to the Bankruptcy Court or to this Court that  
10 DACA documents were destroyed.

11 THE COURT: I'm sorry. I didn't hear you.

12 MR. MOHEBAN: That the Deposit Account Agreements  
13 were destroyed. That's the first I've heard of that. Or  
14 that this other document was altered. And I think we have  
15 fairly rebutted that, that it wasn't altered.

16 So I don't think that Mr. Marder has knowledge and  
17 has submitted to the Court definitive evidence of anyone  
18 destroying a DACA document. And we were simply responding  
19 to the unsupported allegations that he made, you know, with  
20 a witness who had no knowledge about that particular  
21 subject.

22 MR. MARDER: And, Your Honor, just finally I would  
23 note that the document destruction at issue in this case  
24 encompassed not only e-mails, but attachments to e-mails and  
25 the -- it's fair to presume that this DACA agreement, if it

1 was signed, would have been an attachment to an e-mail.

2 The problem is we're in a situation where we  
3 simply don't know because millions of documents were  
4 intentionally destroyed, and we don't know if the DACA  
5 agreement was part of that and there's no way for us to  
6 establish that because of the destruction. That's why we've  
7 been prejudiced by all this.

8 MR. MOHEBAN: I hate to belabor this, but this --

9 THE COURT: I didn't hear you.

10 MR. MOHEBAN: I hate to belabor this, but this  
11 e-mail destruction issue has to do with pre-2005 e-mails,  
12 because after 2005 M&I had the Legato system in place, which  
13 I think has established it saved every e-mail. We're  
14 talking about a document that was created in 2008, so that  
15 cannot bear at all on this backup tape issue that has been  
16 in the case.

17 THE COURT: Counsel, would you respond to that?

18 MR. MARDER: Your Honor, if I could defer to  
19 Mr. Collyard just because he has been engaged in the  
20 spoliation, if you don't mind?

21 THE COURT: He may.

22 MR. COLLYARD: Thank you, Your Honor. The issues  
23 on the document destruction are not limited.

24 So, for example, a major issue at the Bankruptcy  
25 Court level -- and this was their argument at the bankruptcy

1 level -- was everything was captured by Legato. The issue  
2 with -- and Legato is their system that is supposed to  
3 capture all their e-mails. The issue with Legato was it  
4 didn't capture attachments. It didn't capture those types  
5 of things. And Judge Sanberg went into great detail in her  
6 order explaining all of that and how important it was to  
7 have those backup tapes.

8 A secondary issue is in 2014, and this was raised  
9 in the Scherer designations that you considered already,  
10 Your Honor, but in 2014 they find six tapes. And all we  
11 have, the only knowledge of BMO Harris Bank on those six  
12 tapes is from one or two lines of an e-mail -- this is that  
13 John Vanderheyden e-mail; it's Exhibit 325 off the top of my  
14 head -- where it says that Dave looked high and low in the  
15 nooks and crannies and found six Minnesota e-mail backup  
16 tapes with the earliest or latest dated and then it gave an  
17 '07 figure.

18 Nobody from BMO can say what actually was found,  
19 what actually was destroyed because they didn't look at  
20 them. And that was another major explanation that Judge  
21 Sanberg had in her order and that's how -- that's why it  
22 raises the importance of what Mr. Scherer found in 2014 and  
23 then was destroyed.

24 So nobody can come here and say that there wasn't  
25 an e-mail, for example, with an attachment. That could

1 include any document, and it's not limited to any specific  
2 subject matter or anything like that.

3 THE COURT: We're going to take our break now.

4 MR. SCHAPER: Your Honor, there actually is one  
5 more kind of related issue that we would like to address  
6 briefly. Mike Schaper for defendant.

7 We submitted something to the Court yesterday on  
8 the Scherer deposition designation. The plaintiffs  
9 submitted a response with a request for alternative relief.  
10 The Court has now ruled on the Scherer designations to let a  
11 lot of that testimony in.

12 Our position is that that moots plaintiff's  
13 request for alternative relief, which was kind of a mid  
14 trial jury instruction of the sort that I think the Court  
15 has already rejected, at least at the pretrial phase.

16 So our position is that that alternative request  
17 for relief is mooted given that the Scherer testimony, the  
18 portions that the Court is allowing in, will be played for  
19 the jury.

20 THE COURT: Counsel, do you wish to be heard on  
21 that?

22 MR. COLLYARD: I do, Your Honor, just real  
23 quickly.

24 The request was in lieu of playing the -- the  
25 request was in lieu of playing the Scherer deposition in its

1 entirety. And you've ruled on several of the objections  
2 that go to some of the issues that we need to be able to  
3 talk about to prove that when they destroyed the tapes, the  
4 six tapes in 2014, that there's no innocent explanation.

5 And so what we've done here, Your Honor, is we  
6 took your guidance, where you asked the parties to just  
7 agree to basic facts, and we took ten sentences, quoted you  
8 basically verbatim from your July 18th order just to see if  
9 they would agree to these basic facts about what was  
10 destroyed and when. And they simply won't agree.

11 And so that's why we raised the application as  
12 part of Rule 37(e), as part of Rule 201 to move this thing  
13 along to agree to basic things that are not in dispute. And  
14 they simply won't agree. So what I think is going to happen  
15 now is now they're going to actually dispute that tapes were  
16 destroyed, they're going to dispute those basic facts.

17 And so my request is I've only listed the ten  
18 sentences from your order that reasonably should not be in  
19 dispute whatsoever and ask that those findings be read to  
20 the jury as part of the Rule 37(e) portion of what plaintiff  
21 was granted from the Bankruptcy Court to be able to put on  
22 evidence.

23 Thank you, Your Honor.

24 MR. SCHAPER: Your Honor, as I told the Court at  
25 the end of yesterday, we would respond to their proposed

1 stipulation. We did that last night. We thought it was  
2 incomplete and misleading, and we proposed an alternative  
3 stipulation, to which we never got an answer and we still  
4 don't have an answer right now, Judge.

5 We submitted with our filing this morning what our  
6 proposed stipulation would be because we think that's more  
7 complete. It includes some basic details about documents  
8 that were produced, for example. Again, we don't have a  
9 response on that.

10 But we think that what plaintiff's counsel is  
11 seeking is the same kind of instruction on court findings  
12 having been made that the Court declined to give multiple  
13 times when plaintiff requested that pretrial, and we think  
14 it continues to be appropriate for the same reasons.

15 THE COURT: It is -- the request is moot and I  
16 deny it.

17 We're in recess.

18 (Lunch recess taken at 12:13 p.m.)

19 \* \* \* \* \*

20 (1:16 p.m.)

21 **IN OPEN COURT**

22 **(JURY NOT PRESENT)**

23 THE COURT: Good afternoon. Please be seated.

24 We had one outstanding issue that was raised  
25 before the break, and I'm ready to rule now. Both forms of

1 the relief that were -- relief requested before the break,  
2 both forms are denied.

3 We're ready, yes. We'll bring in the jury.

4 (Pause)

5 **IN OPEN COURT**

6 **(JURY PRESENT)**

7 THE COURT: Good afternoon. Please be seated.  
8 Good afternoon, Counsel. You may proceed.

9 MR. COLLYARD: Thank you, Your Honor.

10 (Deposition of Raymond Neufeldt continued)

11  
12 Q. All right. So let's go back to the overall process of  
13 originating a -- a wire transfer.

14 Once the customer gave the Money Transfer Center  
15 information about the recipients of the wire, would they --  
16 they were also required to give the amount of the transfer  
17 requested, correct?

18 A. Yes.

19 Q. Once the customer had given all of the required  
20 information to the person he or she was talking to within  
21 the Money Transfer Center, what would the person in the  
22 Money Transfer Center do?

23 A. After they had all the required information?

24 Q. Yes.

25 A. And the customer was no longer on the phone?



1 Q. Yes.

2 A. They would enter that -- they would enter the  
3 transaction -- or the transaction was actually being entered  
4 when the customer was on the phone, so it would just be a  
5 matter of complete and go.

6 Q. Was -- so -- so your point of that is that the Money  
7 Transfer Center person may not have waited until the call  
8 was over, but may have been filling out the required forms  
9 or entry lines while on the phone with the customer making  
10 the request; is that right?

11 A. Yes. The customer could be calling in five wires. So  
12 the operator would take wire number one to its complete --  
13 to its entirety; and when it was done, hit enter and go.  
14 And then go to the next one.

15 Q. What would happen after the operator hit "enter"?

16 A. The transaction would be released into the system and  
17 then -- depending as to what criteria was established for  
18 it, is a callback required, is it -- you know, various  
19 things like that. It would then be processed.

20 Q. If a request was made for an amount over the authorized  
21 limit for a particular user and either an operator caught  
22 that or the system caught that, what would happen?

23 A. It would be called over the PIN limit and it would go to  
24 an exception queue and then appropriate calls would have  
25 been made to either the customer, if they had somebody that

1 was authorized over that amount, or the account officer.

2 Q. And was there a set procedure that would dictate whether  
3 it was -- whether that call went to the account manager or  
4 to the customer?

5 A. It would be probably what has been most effective for  
6 that particular customer if it had occurred before. You'd  
7 look at also their profile. If they didn't have anybody in  
8 their profile that was allowed to do a transaction of that  
9 level, then you go to the account officer.

10 Q. I understand. So some of the information within the  
11 Wire Transfer Agreement may include a confirming party who  
12 could confirm wires over particular limits, and if that  
13 information was in your system, the natural first step might  
14 be to call that person rather than the account manager  
15 because that information was there; is that right?

16 A. Correct.

17 Q. Who in your department was responsible for handling  
18 requests that ended up in an exception queue?

19 A. It would be by the type of exception. We had more than  
20 one person working queues.

21 Q. And when you say, "type of exception," you described one  
22 that would have been over the authorized PIN limit. Can you  
23 think of other exceptions that would pop up?

24 A. Another would be just no funds -- no funds sufficiently  
25 available or a transaction would come back because the

1 information given to us by the customer for the recipient  
2 was incorrect.

3 Q. So the idea behind the exception is that for some  
4 reason -- you just gave some ideas -- there needed to be  
5 follow-up by someone in your department because the normal  
6 process couldn't be followed?

7 A. Right.

8 Q. If the normal process did follow and the transfer  
9 request didn't go into the exception queue, what would  
10 happen next?

11 A. It would be released.

12 Q. And what are the actual mechanics of it being released?  
13 Where would it go?

14 A. It would go on to the -- Fedwire and go to Fed.

15 Q. Would -- would something like the --

16 A. Let me back up for a second --

17 Q. Yeah.

18 A. -- on that. It would be released and then there would  
19 be a final balance check.

20 Q. What does that mean?

21 A. That means are there sufficient funds in the account to  
22 handle this transaction. And if it came back that there  
23 were sufficient funds in the account, it would be released.

24 Q. So would that final balance check, given its nature as  
25 final, would that be the last step before the transfer

1 actually going out the door?

2 A. Yes.

3 Q. And if it came back that there weren't enough funds, is  
4 that a situation where it would go in the exception queue  
5 and someone in your department may consult the file to see  
6 if there was a policy in place, like the --

7 A. Correct.

8 Q. -- Jambor policy that we discussed earlier?

9 A. Correct.

10 Q. This document is marked as Exhibit 274. It's Bates  
11 labeled BMO00189065 and it's titled Compliance  
12 Self-Monitoring Program, First Quarter 2007.

13 One of the entities listed underneath that title  
14 is "Money Transfer Center." Do you see that just at the top  
15 of the page?

16 A. Yes. Oh, yeah.

17 Q. Do you know anything about a compliance self-monitoring  
18 program?

19 A. I know we had a compliance group and I know that they  
20 periodically would review what we did, and that's it.

21 Q. Okay. I'm just going to direct your attention to  
22 page -- maybe four from the back. At the bottom, it ends in  
23 074. The top of the page says, "Transaction Testing." Do  
24 you see that?

25 A. Yes.

1 Q. And next to number 1 it says, "Select a sample of  
2 outgoing wire transfers conducted on behalf of a transmittor  
3 between October 1st, 2006 and December 31st, 2006." Do you  
4 see that?

5 A. Yes.

6 Q. And then in the box it says, "Results of Testing," and  
7 under that it says there are two exceptions. In the middle  
8 of the box it says, "No beneficiary name indicated." It  
9 lists "Bank 098, Originator: Petters Company, Inc." And it  
10 shows that MTC responds, "The transaction was established as  
11 a repetitive wire at the request of the customer in June of  
12 2003. No beneficiary name information was provided at the  
13 time of setup." Do you see that?

14 A. Yes.

15 Q. Do you have any knowledge of this exception being noted  
16 by compliance?

17 A. Not that I can remember. I may have, but it's --

18 Q. It was a long time ago?

19 A. Yeah.

20 Q. I understand.

21 Do you recall any -- well, do you have any  
22 explanation for how wires could have been made from a period  
23 of two thousand -- June 2003 through the end of 2006 without  
24 a beneficiary name being provided?

25 A. If it was set up as a repetitive, there would have been

1 no changing it or no review of it.

2 Q. So you're saying that because it was set up as  
3 repetitive, it would have just been in the system; and if  
4 the customer had given the right code, it just would have  
5 kept going?

6 A. Correct.

7 Q. And that's the case even though the bank, apparently,  
8 didn't have any information about who the ultimate  
9 beneficiary of those wires were?

10 A. Correct.

11 Q. Do you recall whether the Money Transfer Center took any  
12 actions to remedy this situation?

13 A. I can't recall if we did, but I'm sure that with this  
14 particular thing we would have done something to -- to bring  
15 it into compliance. I mean, this is a self-monitoring  
16 system, so it's --

17 Q. So "self-monitoring" means something that you guys were  
18 doing internally?

19 A. Right, within the bank.

20 Q. Right. It wasn't in response to an outside auditor  
21 coming --

22 A. Correct.

23 Q. -- correct?

24 And I guess just to kind of put the pin on the  
25 whole origination process, the numbers that we looked at in

1 spreadsheet 1870, which listed, under source type, "phone,"  
2 talking about -- which denoted wires originated to the --  
3 via calls to the Money Transfer Center, for every one of  
4 those phone calls in the -- that Petters was making to the  
5 Money Transfer Center, they were talking to a live person  
6 within your department, who was helping them originate one  
7 of those wire transfers, correct?

8 A. Right. Yes.

9 Q. And just given the sheer numbers that we're talking  
10 about, that process was occurring multiple times a day on a  
11 regular basis from this customer, correct?

12 A. Correct.

13 Q. Mr. Neufeldt, I have just a few more kind of final  
14 questions for you. Thanks for your time this morning.

15 I want to start by looking at Exhibit 276, which  
16 is the policies and procedures, and I'll direct you to the  
17 page ending in 165. It's in Section M7.3.

18 A. Am I on the right one?

19 Q. I think so.

20 MR. COMSTOCK: You'll be looking for number 165.

21 MR. REIF: 165 is at the bottom.

22 MR. COMSTOCK: Just the number at the bottom. So  
23 this number but 165.

24 THE WITNESS: Oh, okay. Got it. Sorry.

25 MR. REIF: Okay. Thanks.

1 Q. And the second category or heading is "Daylight  
2 Overdraft Calls and Canceled Transfers." Do you see that?

3 A. Yes.

4 Q. And we talked about daylight overdrafts earlier in the  
5 context of the Jambor memo, correct?

6 A. Right.

7 Q. And so I just want to confirm some of these here.

8 So this says, "A daylight transfer" -- or  
9 "daylight overdraft occurs when the Available Balance in the  
10 customer's account is less than the transfer amount. If  
11 this occurs, the transfer is delayed until release is  
12 authorized. If there are no daylight overdraft instructions  
13 for the customer on file, the Money Transfer Center  
14 representative will contact the account officer or  
15 relationship manager for authorization to release the  
16 transfer." Correct?

17 A. Yes.

18 Q. Okay. So when it's talking about the daylight overdraft  
19 instructions on file, is that referring to a kind of policy  
20 memo or written instructions from Ed Jambor that we looked  
21 at earlier?

22 A. Yes, it would be something specific to that account  
23 relationship for daylight overdrafts.

24 Q. And is one of the differences that was highlighted in  
25 the Jambor memo that -- unlike normal bank policy, which



1 would be to cancel the transfer request if the funds weren't  
2 available, under Jambor's instructions, the Money Transfer  
3 Center would continually check the account through the day  
4 to see if funds were available?

5 A. Yes.

6 Q. I asked you earlier about -- you can set that aside --  
7 the idea of transactions -- wire transaction limits. And  
8 you were not sure whether the operator would check those  
9 limits him or herself or whether the system would check that  
10 limits -- the limits, correct?

11 A. Correct.

12 Q. The limits were associated with a particular authorized  
13 user; is that right?

14 A. Yes.

15 Q. Is it the case that it was the entry of a PIN number  
16 that would allow either the system or the operator to be  
17 able to identify what the limit was for the particular  
18 caller?

19 A. The PIN number would be, yes, for -- would be checked  
20 within the system that would come back with the daylight  
21 overdraft or allow the transaction to occur.

22 Q. So --

23 A. I'm not certain if the operator would know -- the  
24 operator wouldn't know anything until the amount was  
25 entered.

1 Q. Okay. But, regardless, the system would contain the  
2 information associated with transaction limits for a  
3 particular PIN; is that right?

4 A. Yes.

5 Q. And so as part of the process, the -- of discussing an  
6 outgoing transfer, the operator would have to input the  
7 user's PIN, correct?

8 A. Correct.

9 Q. Do you know whether the spreadsheet that we looked at in  
10 1870 contains information with the user's PIN in it? This  
11 would have been part of Exhibit 271.

12 A. 271? I'll go through it, but my initial thought would  
13 be no. This is the transaction itself.

14 Q. And so the detail of the transaction itself, that was  
15 kept within Trail would not record the PIN number associated  
16 with initiating that transaction?

17 A. Well, you do have -- I do not know.

18 Q. So you don't know whether it's recorded, but you know  
19 for sure that it had to have been inputted in the system at  
20 some point --

21 A. Yes.

22 Q. -- in the origination process, correct?

23 A. Right.

24 Q. Do you know whether Trail still exists in some form at  
25 BMO Harris Bank?

1 A. I do not know.

2 Q. When you -- when M&I was acquired by BMO and during your  
3 tenure still working at BMO, did you ever access wire  
4 history via Trail while you were working for BMO?

5 A. I'm guessing we did. I can't give you an example, but  
6 I'm guessing.

7 Q. Did the money transfer intranet still exist after M&I  
8 was acquired by BMO?

9 A. Yes.

10 Q. Do you know whether that still exists today?

11 A. I do not believe it exists anymore.

12 Q. And why do you say that you don't believe it exists?

13 A. Because the wire transfer operation, if I'm not  
14 mistaken, was absorbed into the BMO Harris operation.

15 Q. That's all that I have. Thank you very much for your  
16 time.

17 MR. COLLYARD: Your Honor, plaintiff calls its  
18 next witness. Plaintiff calls -- it has one more video to  
19 play and it's only going to be about 15 minutes long. But  
20 plaintiff calls adverse former BMO Harris Bank employer  
21 David Scherer, who was in M&I and BMO's IT department from  
22 2004 up through 2018.

23 And I have four exhibits to offer along with  
24 Mr. Scherer's video. I offer Plaintiff's Exhibit 325.

25 MR. GLEESON: Just a moment, Your Honor, please.

1 THE COURT: Thank you.

2 MS. GITTES: Your Honor, we just preserve our  
3 objection that was in our deposition designations that the  
4 Court has already ruled on.

5 THE COURT: If you'd like to.

6 MS. GITTES: Yes, please. Thank you.

7 THE COURT: Okay. So I have already ruled.  
8 Overruled.

9 MR. COLLYARD: Is Plaintiff's Exhibit 325 in  
10 evidence, Your Honor, just so I'm clear?

11 THE COURT: It is received.

12 MR. COLLYARD: Thank you. I offer Plaintiff's  
13 Exhibit 327.

14 MS. GITTES: Same objection, Your Honor.

15 THE COURT: Overruled. Received.

16 MR. COLLYARD: Thank you. I offer Plaintiff's  
17 Exhibit 328.

18 MS. GITTES: Same objection, Your Honor.

19 THE COURT: Overruled and received.

20 MR. COLLYARD: Thank you, Your Honor. And I offer  
21 Plaintiff's Exhibit 796.

22 MS. GITTES: I apologize for the delay. We just  
23 need a moment, if that's okay?

24 THE COURT: That's quite all right.

25 MS. GITTES: Thank you.

Scherer -- Deposition

1 (Ms. Gittes, Mr. Schaper, and Mr. Collyard confer)

2 MS. GITTES: Just one more minute, Your Honor.  
3 We've almost figured it out, I think. Sorry.

4 (Pause)

5 MS. GITTES: Thank you for the moment. No  
6 objection.

7 THE COURT: That's Exhibit -- Plaintiff's  
8 Exhibit 325, 327, 328, and 796, they are received.

9 MR. COLLYARD: Thank you, Your Honor.

10 (David Scherer)

11 **DEPOSITION TRANSCRIPT PLAYED**

12  
13 Q. Mr. Scherer --

14 A. Hi, again.

15 Q. -- you and I have met before; is that right?

16 A. Yes.

17 Q. And we met at what I'll call an evidentiary hearing in  
18 this case back in April of 2018; is that right?

19 A. It was in April. I don't know what the hearing is  
20 called, but, yes, we met back in April in Minneapolis.

21 Q. Let's just back up for one second. Now, I think I  
22 forgot to ask you to do this, but would you state your name  
23 for the record.

24 A. David Scherer.

25 Q. Do you have an understanding that people have said that

1       you found backup tapes in August of 2014?

2       A.   Yes, I understand that.

3       Q.   Do you believe that to be true?

4       A.   That I reported the information to John Vanderheyden,  
5       yes.

6       Q.   Do you believe that to be true?

7       A.   Yes.

8       Q.   All right. Do you also have an understanding that  
9       backup tapes were also found in December of 2017?

10      A.   Yes.

11      Q.   And you were involved in talking with people at BMO  
12      Harris about looking for those backup tapes; is that right?

13      A.   Yes.

14      Q.   And, in fact, your team went out and looked for those  
15      backup tapes; is that also true?

16      A.   Paul Stroble looked for those tapes.

17      Q.   Do you agree with me that Paul Stroble was on your team?

18      A.   Yes.

19      Q.   So your team went out and looked for those backup tapes?

20      A.   Yes.

21      Q.   Okay. And actually found the backup tapes, right?

22      A.   Paul did, yes.

23      Q.   We'll come back to some of this. Let's go back for just  
24      a second to -- and, by the way, when you testified at the  
25      evidentiary hearing, you knew all this information; is that

1 right?

2 A. I believe so.

3 Q. For example, when I questioned you on the stand at the  
4 evidentiary hearing, you had known that Paul Stroble had  
5 found backup tapes in December of 2017; is that true?

6 A. I believe so.

7 Q. You knew as well, Mr. Scherer, at the time that I asked  
8 you questions at the evidentiary hearing, that you had found  
9 backup tapes in August of 2014; isn't that true?

10 A. I didn't recall finding tapes.

11 Q. I'm not asking about your specific recollection of the  
12 tapes. I'm asking you: Just as a general matter, you knew  
13 at the time that you and I were talking at that evidentiary  
14 hearing that you had found backup tapes back in August of  
15 2014, correct?

16 A. Yes.

17 Q. Mr. Scherer, you've been handed what's been marked as  
18 Exhibit 325. This is an e-mail from John Vanderheyden to an  
19 A. Cares and Jonathan Ingrisano at Godfrey & Khan and it's  
20 dated August 26th of 2014. Do you see that?

21 A. Uh-huh, yes.

22 Q. Did you see this e-mail before the evidentiary hearing?

23 A. I believe so, yes.

24 Q. And, in fact, you knew about this e-mail before you took  
25 the stand at the evidentiary hearing; is that right?

1 A. I believe so.

2 Q. You knew about this particular e-mail, Exhibit 325, when  
3 you submitted your declaration to the Court; is that also  
4 true?

5 A. Yes.

6 Q. Let's take a look at this e-mail. Mr. Vanderheyden  
7 writes, "Dave looked in all the nooks and crannies over  
8 there today and found a total of six backup tapes from the  
9 Minnesota e-mail server. The oldest one was MSP105 labeled  
10 'Aug '07.'" Do you see that?

11 A. Yes.

12 Q. And the "Dave" that Mr. Vanderheyden is referring to is  
13 you; is that right?

14 A. I would assume so.

15 Q. Well, you know that's true, right?

16 A. I would assume so.

17 Q. So you agree with me that the "Dave" referred to in this  
18 e-mail is you?

19 A. I have no reason to think otherwise.

20 Q. And where it says "over there today," specifically I'm  
21 focusing in on "over there," do you know what  
22 Mr. Vanderheyden is referring to there?

23 A. I'm assuming it was Centre Point, Liberty Point.

24 Q. But you don't know?

25 A. I'm assuming.



1 Q. Do you know if you did find the backup tapes in August  
2 of 2014 at the Centre Point location?

3 A. I don't recall seeing the tapes or --

4 Q. So -- go ahead, finish. I'm sorry.

5 A. I don't recall seeing the tapes.

6 Q. So you can't say for sure that you found the backup  
7 tapes at the Centre Point location?

8 A. I can -- that is correct, yes.

9 Q. So you can't come to trial, for example, and testify  
10 that you actually found the tapes at the Centre Point  
11 location?

12 A. I -- like I said, I don't recall back in 2014.

13 Q. So my question is specific. You can't come to trial and  
14 testify, for example, that you found the backup tapes in  
15 August 2014 at the Centre Point location?

16 A. Like I said, I don't remember finding the tapes.

17 Q. Mr. Vanderheyden says that you "looked in the nooks and  
18 crannies over there and found a total of six backup tapes  
19 from the Minnesota e-mail server." Do you see that?

20 A. Uh-huh.

21 Q. You have no reason to believe that that's not truthful,  
22 do you?

23 A. No, I do not.

24 Q. And like we talked about, you would believe that  
25 Mr. Vanderheyden was capable of conveying information in an

1 accurate manner; is that true?

2 A. Yes.

3 Q. So if this is indeed what you told John Vanderheyden,  
4 you would believe that he's being truthful and accurate in  
5 conveying this information to these folks; is that right?

6 A. I have no reason to think otherwise.

7 Q. It says, "The oldest one was MSP105 labeled 'August  
8 '07.'" Do you see that?

9 A. Yes. Yes.

10 Q. Where it says, "MSP," what does that prefix stand for?

11 A. Minneapolis-St. Paul.

12 Q. And you know that just by looking at that?

13 A. Uh-huh. Yes. Sorry.

14 Q. So if you knew that -- let's go back to August of 2014.  
15 You knew that if there was a prefix of "MSP," that meant  
16 Minneapolis-St. Paul, right?

17 A. Yes.

18 Q. And that would refer to Minnesota regional tapes; is  
19 that right?

20 A. Yes. Yes.

21 Q. And you have no reason to believe, Mr. Scherer, that you  
22 did not find six backup tapes from the Minnesota e-mail  
23 server, correct?

24 A. Like I said, I don't recall how many I found or how many  
25 were in there.

1 Q. I understand.

2 A. Okay.

3 Q. My question is different, though. You have no reason to  
4 believe that you did not find six backup tapes from the  
5 Minnesota e-mail server; is that true?

6 A. Yes.

7 Q. And, again, Mr. Scherer, it was unusual for you to be  
8 looking for backup tapes of this nature back in August of  
9 2014; is that right?

10 A. Yes.

11 Q. And even though it was unusual, you still don't recall  
12 doing it; is that what you are telling us?

13 A. Yes.

14 Q. If we go back, just so the jury knows what you are  
15 talking about, that is the e-mail in Exhibit 325, right?

16 A. Yes.

17 Q. That e-mail refreshed your recollection that you had  
18 found the backup tapes in 2014; is that right?

19 A. It did not give me a memory of doing it, of finding  
20 tapes or how many tapes or any of that.

21 Q. Did it help you remember the fact that you found backup  
22 tapes in 2014, even though you may not remember the  
23 specifics of the tapes?

24 A. I would assume so, because this "Dave" refers to me.

25 Q. And I know you told me that you can't remember any of

1 the specifics of finding the tapes in August of 2014; is  
2 that right?

3 A. Yes.

4 Q. And so you can't remember, Mr. Scherer, whether the  
5 tapes were in a locked cabinet, for example, when you found  
6 them?

7 A. I cannot.

8 Q. You certainly don't remember finding them in a locked  
9 cabinet; is that right?

10 A. Yes.

11 Q. Just give me your best recollection as to when your  
12 memory was refreshed by Exhibit 325.

13 A. I don't recall when -- when I saw this.

14 Q. Do you recall it being around the evidentiary hearing  
15 time?

16 A. It's possible.

17 Q. Or was it during this December time frame, when you were  
18 looking for the e-mail backup tapes?

19 A. I can't recall.

20 Q. Were you -- so let's just back up. You understood,  
21 through these multiple conversations with the Mayer Brown  
22 lawyers, that it was important to find backup tapes, right?

23 A. Yes.

24 Q. And you told me you specifically remember them stressing  
25 the importance of that, right?

1 A. Yes.

2 Q. What was your reaction, then, when you remembered that  
3 you had actually found backup tapes back in August of 2014?

4 A. I don't recall when it was that I was shown this, so I  
5 don't -- so I don't know what time frame that was.

6 Q. Is it your testimony that you just basically had no  
7 reaction to seeing the e-mail?

8 A. I didn't have a reaction, no.

9 Q. Did you get a sense of what others' reaction was when it  
10 was discovered that you had found backup tapes back in  
11 August of 2014?

12 A. No.

13 Q. Did you ever talk with Paul Stroble about it?

14 A. No.

15 Q. Did you ever talk with anybody at BMO about it?

16 A. I don't recall.

17 Q. You don't recall if you spoke to anybody at BMO about  
18 the fact that you found backup tapes back in August of 2014?

19 A. I don't recall.

20 Q. Mr. Scherer, you've now been handed what's been marked  
21 as Exhibit 327, which is your declaration, the Declaration  
22 of David Scherer, that you submitted as testimony into  
23 evidence at the evidentiary hearing, and it is dated  
24 March 29, 2018. Do you see that?

25 A. Yes.

1 Q. This is your declaration; is that right?

2 A. Yes.

3 Q. You have seen this document, right?

4 A. Yes.

5 Q. Did you read this document before it was submitted?

6 A. I believe I did back in the day.

7 Q. Now, you knew at the time that you submitted this  
8 declaration that you had found the backup tapes in August of  
9 2014, right?

10 A. Yes.

11 Q. Yet you didn't say that in this declaration, did you?

12 A. No, it's not in here.

13 Q. And you knew, then, at that hearing that the hearing  
14 involved the discovery of backup tapes; is that also  
15 correct?

16 A. Yes.

17 Q. And certainly you knew when I was asking you questions  
18 that the hearing involved the discovery of backup tapes,  
19 right?

20 A. I vaguely remember you asking me about that, yes.

21 Q. Okay. And I'll show you some of that in a second.

22 But you did not tell me at the hearing that you  
23 found backup tapes in August of 2014, did you?

24 A. I did not.

25 Q. Did you want to disclose at the evidentiary hearing that

1 you had found those backup tapes in August of 2014?

2 A. It didn't cross my mind.

3 Q. Mr. Scherer, I'm handing you what's been marked as  
4 Exhibit 328. It's a copy of the transcript from the  
5 evidentiary hearing where you testified and I asked you  
6 questions. Do you see that?

7 A. Yes.

8 Q. Just take a look at a few things here. If you'd go to  
9 page 50, please, I asked you on line 5, I said:

10 "Are you familiar with backup tapes?"

11 You answered: "A little bit. That was a different  
12 team."

13 Do you see that?

14 A. Yes.

15 Q. Now, your team was the one who found the backup tapes in  
16 August -- or, I'm sorry, December of 2017, right?

17 A. Yes.

18 Q. And you and your team found them in August of 2014 as  
19 well, right, whatever tapes those were?

20 A. Yes.

21 Q. When I asked you if you were familiar with backup tapes,  
22 you didn't tell me that you had found backup tapes in August  
23 of 2014, did you?

24 A. No, I did not.

25 Q. Then I said, "Okay. And tell us what your familiarity

1 is with backup tapes." Do you see that?

2 A. Line 16?

3 Q. Line 7, actually.

4 A. 7. Okay.

5 Q. Do you see that?

6 A. Yes.

7 Q. And, again, you didn't tell me that you had found backup  
8 tapes in August of 2014 when I asked you that question, did  
9 you?

10 A. Nope.

11 Q. So you can't say that the tapes found in December of '17  
12 are the same tapes as what was found in August 2014?

13 A. And I can't say they're different either.

14 Q. You can't say one way or the other?

15 A. Right.

16 Q. But you knew at the time I asked you the question that  
17 there had been a representation that one of the tapes found  
18 in December 2017 had been known about at BMO since August of  
19 2014, right?

20 A. I was going with this line of questioning as to the  
21 tapes in 2017. That was what I was basing my answers on.

22 Q. Okay. So your testimony is you were limiting your  
23 answer to the tapes found in December of 2017; is that  
24 right?

25 A. Yes.



1 Q. Okay. So you say, "I never saw the tape"?

2 A. Right.

3 Q. Do you remember I showed you a document that talked  
4 about a tape labeled MSP105?

5 A. Yes.

6 Q. I asked you in particular about this tape and I asked  
7 you about what a full system backup meant. Do you remember  
8 that?

9 A. Yes.

10 Q. And you told me that that means that there's e-mails and  
11 documents on that tape, right?

12 A. e-mails and operating system, yes.

13 Q. And that would include documents, right?

14 A. Attachments and e-mails, yes.

15 Q. Do you agree with me that you did not tell me that you  
16 had found tapes back in August of 2014?

17 A. Yes.

18 Q. And you were making no representation at the evidentiary  
19 hearing that the Aug 2007 full system backup volume MSP105  
20 was discovered in 2014, correct?

21 A. Correct.

22 Q. And you can't make that representation as you sit here  
23 today?

24 A. Again, I don't recall what was -- what tapes were found  
25 back then, in 2014.

1 Q. So you agree with me that you cannot make that  
2 representation sitting here today?

3 A. Yeah, I don't recall what was -- what was on the tapes  
4 in 2014.

5 Q. Do you agree with me?

6 A. Yes.

7 Q. Mr. Scherer, I'm handing you what's been previously  
8 marked as Exhibit 324 and if you flip to -- you know what a  
9 Bates number is, right? Remember we went through that at  
10 the evidentiary hearing?

11 A. No, I don't remember that.

12 Q. Okay. If you look at the lower right-hand corner, you  
13 see the BMO number?

14 A. Yes.

15 Q. Why don't you flip to the one ending in 953. Are you  
16 there?

17 A. Yes.

18 Q. And what do you see there?

19 A. Looks like an HP tape cartridge in a case.

20 Q. And can you tell me, by just looking at this photo, what  
21 this tape is?

22 A. I have no knowledge of tapes, so, no, I can't.

23 Q. And can you tell me whether or not there would be  
24 e-mails on this tape?

25 A. I could not tell you that.

1 Q. Can you tell me or anybody else whether or not this tape  
2 would be associated with an e-mail server?

3 A. I could not answer that, no.

4 Q. You can't tell just by looking at the photo, right?

5 A. Correct.

6 Q. If you turn the page to Bates ending in 954. Do you see  
7 that one?

8 A. Yes.

9 Q. And do you see it says, "BK7505"?

10 A. Yes.

11 Q. What does that mean?

12 A. I have no idea.

13 Q. And, again, you can't tell by looking at that portion of  
14 the tape whether or not it's associated with any particular  
15 e-mail server, correct?

16 A. Correct.

17 Q. I have no further questions.

18 MR. ANTHONY: Good afternoon, Your Honor.

19 THE COURT: Good afternoon.

20 MR. ANTHONY: I'm going to try to get this down to  
21 my height.

22 THE COURT: Understood.

23 MR. ANTHONY: I see you laughing.

24 All right. I'm going to try to find us a live  
25 witness, Your Honor. We're going to call Debra Lindstrom.

1 MR. ANTHONY: Ms. Lindstrom, come up, come up.  
2 You're going to go sit there.

3 THE WITNESS: Okay.

4 COURT REPORTER: Ms. Lindstrom, can you stand and  
5 raise your right hand, please.

6 (Witness sworn)

7 COURT REPORTER: You may have a seat. Could you  
8 please state your name and spell it slowly right into the  
9 microphone there. If you can pull the microphone up to you.

10 THE WITNESS: Debra Marie Lindstrom, D-e-b-r-a,  
11 M-a-r-i-e, L-i-n-d-s-t-r-o-m.

12 (Debra Lindstrom)

13 **DIRECT EXAMINATION**

14 BY MR. ANTHONY:

15 Q. Ms. Lindstrom, I'm going to wait until they finish  
16 unpacking all those exhibits that you are going to have to  
17 identify.

18 A. Okay.

19 Q. So we're going to let them unpack them, but it's going  
20 to be a lot easier than having to go through each one, I  
21 assure you.

22 (Pause)

23 MR. ANTHONY: Thank you.

24 THE COURT: Counsel, you may proceed.

25 MR. ANTHONY: Thank you, Your Honor.

BY MR. ANTHONY:

Q. Please tell the jury a little bit about yourself. Where do you live?

A. I live in Lester Prairie.

Q. And where is that?

A. It's about an hour and a half drive from here west of the Cities.

Q. Okay. And do you have children?

A. I have three.

Q. And I'm going to guess you have a dog?

A. Yes.

Q. Okay. You're laughing. What is it about your dog that --

A. Oh, he's just a big baby.

Q. Okay. All right. So are you working?

A. Yes.

Q. Where do you work?

A. I work for Loomis Homes in Chaska.

Q. What do you do?

A. I do accounting and payroll.

Q. Okay. How long have you been there?

A. Six years.

Q. And what did you do before that?

A. I worked for a -- Wilson Development Services.

Q. What did you do there?

Lindstrom - Direct

1 A. The same, bookkeeping, payroll.

2 Q. That takes us back to about what year?

3 A. That takes me back until unemployment after Petters.

4 Q. Okay. So let's focus on that. When did you work at,  
5 we'll call it, the Petters operation?

6 A. From March of '97 through December of 2009.

7 Q. What was the first job that you had there?

8 A. Receptionist.

9 Q. And how long did you hold that position?

10 A. A year and a half.

11 Q. And then what was the next position you had?

12 A. Assistant to Tom Petters.

13 Q. And how long did you hold that position?

14 A. Four and a half years.

15 Q. Was that a tough job?

16 A. Yes.

17 Q. Because high pressure? What was it?

18 A. Stress level.

19 Q. Okay. And what were your duties as his assistant,  
20 administrative assistant?

21 A. To Mr. Petters?

22 Q. Yes.

23 A. Setting up appointments, business and personal; setting  
24 up personal appointments for his kids; typing e-mails if he  
25 wanted an e-mail sent to a president or vice president of

one of the other departments, one of the other entities.

Q. Now, at some point you worked for PCI, correct?

A. Yes.

Q. In what period of time did you work for PCI?

A. June -- well, actually, since I started up until the raid happened, 2008.

Q. And the second position, the position you had after working for Mr. Petters, who did you work for in that position?

A. Deanna Coleman.

Q. And sometimes she's known by the name of Deanna?

A. Munson.

Q. So which name do you know her by better so we can use that name for you?

A. Coleman.

Q. Okay. So Deanna Coleman. And what did you do for Ms. Coleman?

A. I typed promissory notes and called the investors when the promissory notes were due to see if they wanted to renew the note or to be paid.

Q. And I think there's been some testimony that she was a vice president --

A. Yes.

Q. -- and Mr. Petters was the president of PCI; is that correct?

1 A. President, CEO.

2 Q. Okay.

3 A. And Deanna was vice president.

4 Q. Okay. And in your role -- and so your duties -- in  
5 addition to what you just described, did you also have some  
6 duties or responsibilities with respect to wires?

7 A. I'm sorry. To what?

8 Q. Did you have duties with respect to wires, sending  
9 wires?

10 A. Yes.

11 Q. Okay. So tell the jury what your -- the jury what your  
12 duties were with respect to sending wires for PCI.

13 A. When Deanna was out of the office for whatever reason, a  
14 day, a week, whatever, promissory notes were due during that  
15 time frame, and she would have a spreadsheet of what was due  
16 and what dates it was due. And I would have to call the  
17 wire department at M&I Bank and initiate the wire.

18 Q. So who were the people at PCI when you were there who  
19 were responsible for sending and receiving wires?

20 A. Deanna, myself, and Tom Petters.

21 Q. Okay. And the jurors heard some testimony from a  
22 Mr. Neufeldt by video, who was in the operations department,  
23 I think, of the bank. And he talked a little bit about  
24 wires, and now I'm going to ask you a little bit about  
25 wires.



1                   When you say you called in a wire, how did you do  
2     it?

3     A.   I would call the wire department.   I would -- let me  
4     back up.   When we had to send a wire to a private investor,  
5     we -- and it was going to be wires that were done over  
6     multiple times, we would set up a code, a four-digit code,  
7     so that when we called in the wire, that four-digit code  
8     identified who it was going to and what bank it was going  
9     to.

10                  And so whenever I had to call in a wire, I would  
11     call the wire department, give them the code, the dollar  
12     amount, and that was pretty much it.

13     Q.   Okay.   And then when Ms. Coleman sent in a wire or made  
14     a wire request, how would you know she had done that?

15     A.   You can request a confirmation number when the wire has  
16     been sent.

17     Q.   Was that usually done?

18     A.   Yes.

19     Q.   Okay.

20     A.   And that four- to six-digit confirmation number would be  
21     written at the top of the first page of the promissory note.

22     Q.   Okay.

23     A.   And then she would hand that promissory note to me to  
24     call whoever that note belonged to and find out what they  
25     wanted done with it.

1 Q. All right. So it was either you sending the wire or her  
2 sending the wire. And if she sent it, she'd give you a  
3 document that showed you she sent it?

4 A. Yes.

5 Q. Did you also get faxes that confirmed wires when you  
6 made wire requests?

7 A. We received fax notifications from the bank when there  
8 was an incoming wire.

9 Q. Okay. Well, let's talk about how incoming wires worked.  
10 How were you alerted by the bank -- when you say "the bank,"  
11 which bank?

12 A. M&I Bank.

13 Q. Okay. How did M&I Bank alert you to the incoming wires?

14 A. They would send a fax.

15 Q. And how would you know the fax was from M&I Bank and not  
16 somebody else making believe they were M&I Bank?

17 A. Well, I would hope it was M&I Bank. It had it at the  
18 top of the fax notification.

19 Q. Okay. Now, in your position at PCI, did you also --  
20 were you also responsible for receiving and opening Money  
21 Transfer Statements from M&I Bank to PCI showing the daily  
22 wire activity that you were familiar with?

23 A. Yes.

24 Q. Now, I'm going to ask you to look at -- take any one of  
25 those volumes there and just open it up to any page. Now,

1 at my request did you go through all those volumes today to  
2 see what was in there?

3 A. Yes.

4 Q. And what's in there?

5 A. Wire transfer statements from M&I Bank.

6 Q. And does the bank's name appear on each and every one of  
7 those statements, to the best of your recollection?

8 A. Yes.

9 Q. And tell the jury what those statements are that are in  
10 those volumes that are next to you.

11 A. It's a Money Transfer Statement. It shows who the wire  
12 is going to, who it's coming from, and the dollar amount.

13 Q. And how often would statements like that come from M&I  
14 Bank to you?

15 A. I don't recall the exact number of times. It could have  
16 been weekly. It could have been once a month. I don't  
17 recall.

18 Q. Okay. Do you recall the envelopes they came in?

19 A. Yes. They were your regular standard letter envelopes,  
20 and sometimes they were pretty thick.

21 Q. Okay. And were those Money Transfer Statements that you  
22 are referring to in that -- does that have an exhibit number  
23 on those books? Is it Exhibit 660? If you look at the  
24 binder on the side, does it say, "660"?

25 A. Yes.

1 Q. And each of those six books have an Exhibit 660 marker  
2 on them, right?

3 A. Yes.

4 Q. Okay. And just tell the jury the information that  
5 appears on the typical Money Transfer Statement that appears  
6 in Exhibit 660. Starting at the top of the page, what's on  
7 the top?

8 A. At the very top it says, "M&I Bank Money Transfer  
9 Statement," and it says, "Page 2 of 2." It gives the date.  
10 It gives the company name, which is Petters Company, Inc.,  
11 attention --

12 Q. Does it give the address?

13 A. Yes.

14 Q. What's the address?

15 A. 4400 Baker Road, Suite 200, Minnetonka, Minnesota,  
16 55342.

17 Q. And then it has a list of transactions?

18 A. Yes.

19 Q. And you received those documents and opened them in the  
20 ordinary course of doing your business at PCI?

21 A. Yes.

22 MR. ANTHONY: Plaintiff offers Exhibit 660,  
23 Your Honor.

24 MS. GITTES: No objection from defendants with  
25 one -- I apologize. One caveat is we just haven't had a

1 chance to look at the binders. So perhaps, rather than  
2 burden the Court and jury, we can look after and we can  
3 raise any issues at that time. But otherwise, no objection.

4 THE COURT: Exhibit 660 is received.

5 BY MR. ANTHONY:

6 Q. I'm going to ask you one thing about the wires. Did you  
7 ever send wires on your own without Ms. Coleman approving it  
8 or authorizing it?

9 A. No.

10 Q. That wouldn't have been part of your job, to just send  
11 out any wire, right? Is that correct?

12 A. Yes.

13 Q. Okay. Just to show the jury, I'm not going to go  
14 through but one or two of these statements just to show them  
15 visually what it looks like.

16 MR. ANTHONY: So I'm going to ask Ms. Ellig to put  
17 up page -- Plaintiff's 660-A-181, please.

18 BY MR. ANTHONY:

19 Q. Do you have that on your screen?

20 A. Yes.

21 Q. Okay. So --

22 MR. ANTHONY: Actually, put up 660-180, please.

23 MS. GITTES: Is this in the binder?

24 (Counsel confer)

25 BY MR. ANTHONY:

1 Q. And just tell the jury as you go through this -- you  
2 mention it's got the bank's name at the top, right?

3 A. Yes.

4 Q. The date, right?

5 A. Yes.

6 Q. And then scroll down. It says -- right there. Is that  
7 \$10 million?

8 A. Yes.

9 Q. And does that show a wire from PCI to Thomas Petters in  
10 the M&I Bank Transfer Statement of \$10 million?

11 A. It shows it on the statement.

12 Q. Okay.

13 A. Yes.

14 MR. ANTHONY: And maybe if you could make that a  
15 little smaller, Ms. Ellig, so we can see the entire  
16 statement, please. Okay.

17 BY MR. ANTHONY:

18 Q. And so, for example, there may be -- if we look at that,  
19 there may, in fact, be multiple wires on that date, right?  
20 So if we look --

21 MR. ANTHONY: If you'd put up page 181, please.

22 BY MR. ANTHONY:

23 Q. That would be same day, December 19th, and there's  
24 another three transactions there?

25 A. Yes.

1 Q. And then let's go to page 182 of Exhibit 660-A, and  
2 we'll see there's another three there, right?

3 A. Yes.

4 Q. And is this the way the documents typically came in,  
5 there might be multiple transactions on a particular  
6 statement?

7 A. Yes.

8 Q. Now, I'm just going to cover one other thing with you.  
9 Pretty traumatic what happened when the raid occurred for  
10 you?

11 A. Yes.

12 Q. Okay. You haven't been charged with any crime or  
13 anything like that, have you?

14 A. No.

15 Q. No. And just share with the jury what happened the day  
16 of the raid so they get a sense of what was going on out at  
17 the PCI headquarters on the day the FBI raided.

18 A. Well, the day of the raid, it was a Wednesday. I  
19 believe it was September 23rd of 2008. About 9:00 a.m. that  
20 morning, an FBI agent came up to the third floor, which is  
21 where we were located, and said, I am so-and-so from the  
22 FBI. Please step outside of your office. Stop what you are  
23 doing, hang up your phone, and step outside your door. And  
24 he proceeded to -- I don't recall exact words. He said,  
25 You're being -- done working, I guess you could say. You're

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1 free to leave.

2 And as I turned to go back into my office, I had  
3 two postal workers standing on either side of me, who  
4 followed me into my office and closed the door and proceeded  
5 to question me for one to two hours.

6 Q. Thank you for coming here today, Ms. Lindstrom.

7 MR. ANTHONY: I don't have any more questions at  
8 this time. Thank you.

9 THE COURT: Cross-examination?

10 MS. GITTES: Yes, please, Your Honor. Just one  
11 moment and we can distribute what we have. May I approach  
12 to give --

13 THE COURT: You may.

14 (Documents handed to witness)

15 MS. GITTES: You don't need to open it yet,  
16 Ms. Lindstrom.

17 (Documents handed to the Court)

18 THE COURT: Thank you.

19 **CROSS-EXAMINATION**

20 BY MS. GITTES:

21 Q. Good afternoon, Ms. Lindstrom.

22 A. Hi.

23 Q. I'm Susan Gittes. I'm one of the lawyers for BMO Harris  
24 Bank.

25 A. Okay.



1 THE COURT: Counsel, will you adjust the mic so we  
2 can hear you, and maybe the podium as well.

3 MS. GITTES: Perhaps it's too low. Fancy. Okay.  
4 Is that better?

5 THE COURT: It is better. Thank you.

6 MS. GITTES: Okay.

7 BY MS. GITTES:

8 Q. Hi, Ms. Lindstrom.

9 A. Hi.

10 Q. So I'd like to start by asking you a little more about  
11 your understanding of Mr. Petters' businesses.

12 You said you started working at PCI in 1997; is  
13 that right?

14 A. Yes.

15 Q. That means you worked there for -- is it 13 or 14 years?

16 A. Twelve years, nine months.

17 Q. Not that you are counting.

18 And in the course of your employment, you became  
19 familiar with the kinds of business Mr. Petters was doing;  
20 is that right?

21 A. Yes.

22 Q. And Mr. Petters and the companies he owned had hundreds  
23 of employees between 2002 and 2008; is that right?

24 A. Yes.

25 Q. And we know today that PCI was a Ponzi scheme, but back

1 then there were -- some of those businesses were legitimate;  
2 is that right?

3 A. Yes.

4 Q. Meaning they did actual business. Like Polaroid?

5 A. Yes.

6 Q. Fingerhut?

7 A. Yes.

8 Q. Sun Country Airlines?

9 A. Yes.

10 Q. UBid?

11 A. Yes.

12 Q. And at one point Mr. Petters had retail stores; is that  
13 right?

14 A. Yes, Petters Warehouse Direct.

15 Q. And there was real merchandise in Petters Warehouse  
16 Direct, right?

17 A. Yes.

18 Q. You could walk in and buy a TV or a washer/dryer or  
19 something like that?

20 A. Correct.

21 Q. There were more than ten locations of Petters Warehouse  
22 Direct at some points between 2002 and 2008, right?

23 A. Yes.

24 Q. And is it true that there was even one in the Mall of  
25 America for a short time?

Lindstrom - Cross

1 A. For a short time.

2 Q. And in the course of your work for Mr. Petters, you  
3 became familiar with something called the Petters Group or  
4 Petters Group Worldwide; is that right?

5 A. Yes.

6 Q. And that's another company that Mr. Petters owned?

7 A. Yes.

8 Q. And in the course of your work, you knew that Petters  
9 Group published its own magazine, right?

10 A. I knew what?

11 Q. That Petters Group published a magazine.

12 A. Was more of a newsletter, to my understanding.

13 Q. Okay. Well, if I can direct you to open up your binder,  
14 just in the back -- or in the front, excuse me. I'm not  
15 going to ask anyone to put it up on the screen. These  
16 aren't in evidence. But in the front pocket there are five  
17 documents. If you could just take a second to review those  
18 and see if they are familiar to you.

19 MR. ANTHONY: Your Honor, we'll have an objection  
20 to these magazine articles. I think you've already ruled on  
21 them, so -- we have an objection that they have already been  
22 ruled inadmissible hearsay.

23 THE COURT: Yes, there has been a ruling. There's  
24 a question just asking for -- I don't know what the question  
25 is.

1 MS. GITTES: I'm happy to explain at sidebar,  
2 Your Honor, or we can proceed and we can deal with it as it  
3 comes.

4 THE COURT: Yes, please, sidebar.

5 MS. GITTES: Okay. Thank you.

6 **(At sidebar)**

7 MS. GITTES: So your ruling was based on, as I  
8 understood it, Your Honor, was based -- excluding the  
9 magazines was based on the fact that Ms. Pesch didn't have  
10 personal knowledge of those materials.

11 And Ms. Lindstrom, in contrast, has testified  
12 previously in another proceeding that she was familiar with  
13 the magazine, that it was an employee newsletter, and as to  
14 the content.

15 And I believe I can establish that it was a  
16 business record that she received and was aware of in the  
17 ordinary course of her business and that it's admissible  
18 under 803(6).

19 THE COURT: And why is it relevant?

20 MS. GITTES: It goes to the public information in  
21 the public about Mr. Petters and his businesses, and it goes  
22 to the fact that this was out there. And it's corroborative  
23 of Ms. Pesch's testimony where she talked about having seen  
24 magazines as relevant to her understanding of who  
25 Mr. Petters was and his businesses.

THE COURT: So they are not offered for the truth of any matter asserted?

MS. GITTES: Well, Your Honor, I think they are -- it's under the business records exception to the hearsay rule.

THE COURT: So what is the business record?

MS. GITTES: These are business records of PCI and Petters Group.

MR. ANTHONY: That's not a business record. It's a hearsay publication that was hearsay then, is hearsay now.

There's been already plenty of testimony that Petters was widely known. Nobody has disputed the fact that he's widely known. We've had a number of witnesses talk about that. She can ask her if he was widely known and he was a philanthropist and he made all these contributions.

This is hearsay that is simply inadmissible. It's not a business record that she created or even was responsible for overseeing. It's not something she did in the ordinary course of her job, like the Money Transfer Statements, where she got them every day, opened them, and did what she did with them. This is somebody else writing about Petters Group. That's why they are hearsay.

MS. GITTES: May I respond on that point, Your Honor?

THE COURT: (Indicating.)

MS. GITTES: There's Eighth Circuit case law, which I can if I go back and get my phone, I didn't want to bring it up, that says to be admissible as a business record, the witness does not have to have created the document. She just needs to have been aware of it in the course of her daily activities at work. And I believe I can lay a proper foundation such that she was aware of them.

THE COURT: What is the nature of this as a business record?

MS. GITTES: It's a record that Petters and his company put -- distributed to employees, distributed externally, put on a website. It's a publication that they made and they put out into the world. And she's already, you know --

MR. ANTHONY: She doesn't have the foundation for any of that. That's why it's not a business record.

MS. GITTES: It's --

MR. ANTHONY: Excuse me. Excuse me. I didn't mean to cut you off.

She didn't create it. She wasn't responsible for it. She didn't oversee it. It wasn't part of her duties or responsibilities. And she said she thought there was a newsletter, but never testified that as a regular course of the business she was somehow associated or affiliated with that. It's simply hearsay and it doesn't -- I think you've

1 already got all this stuff in. This is repetitive in  
2 addition.

3 MS. GITTES: I would just add, Your Honor, and I  
4 don't want to belabor the point, but the core of the  
5 plaintiff's case is that we should have been aware of red  
6 flags and of information and we should have figured out more  
7 about Petters.

8 This is information that Mr. Petters and PCI,  
9 which is the party against who you are claiming was harmed  
10 in this, was -- what they were doing. There are pictures in  
11 here of the offices Mr. Jambor would have seen.

12 MR. ANTHONY: It's --

13 MS. GITTES: There is information about his  
14 charitable activities, about his -- and so I think it goes  
15 to what information was in the public record between 2002  
16 and 2008.

17 And the other thing I would just add is, you know,  
18 PCI here is the plaintiff. Is Mr. Kelley going to  
19 authenticate this? Defendant's hands are tied if -- we're  
20 limited because of the nature of the claims that are  
21 brought.

22 Ms. Lindstrom, I believe, can say she received  
23 them in the ordinary course of her job; and if she can do  
24 that, she can testify as to their contents.

25 MR. ANTHONY: She can't testify because it's

1 hearsay. This is written by someone other than her about  
2 someone other than her. It would be like me saying it's a  
3 business record that the *Star Tribune* writes a story about  
4 me that I can somehow -- that someone can authenticate it  
5 and say it's my business record because it's written about  
6 me. This is Tom Petters' hearsay that has no relevance and  
7 no foundation through this witness.

8 THE COURT: I am prepared to rule. The objection  
9 is sustained for the reasons that have been stated. It is  
10 hearsay, it is likely to confuse the jury, and it is more  
11 prejudicial than probative.

12 **(In open court)**

13 BY MS. GITTES:

14 Q. Sorry about that, Ms. Lindstrom. Just one moment.

15 (Pause)

16 Q. You worked closely --

17 MS. GITTES: May I continue, Your Honor?

18 THE COURT: Yes, you may.

19 MS. GITTES: Thank you.

20 BY MS. GITTES:

21 Q. You worked closely with Deanna Munson and Tom Petters  
22 throughout the course of your employment at PCI; is that  
23 right?

24 A. Yes.

25 Q. And you understood that Mr. Petters -- did you



1 understand that Mr. Petters was well known in the Twin  
2 Cities at that time?

3 A. Yes.

4 Q. You knew that he was involved in a lot of charity work?

5 A. Yes.

6 Q. You knew that he would sometimes be pictured with  
7 celebrities at events?

8 A. Yes.

9 Q. Do you remember any of the celebrities he was seen with,  
10 sitting here today?

11 A. Sitting here today?

12 Q. I'm asking if you remember --

13 A. Oh.

14 Q. -- from your time at PCI any of the celebrities that you  
15 might have seen Tom take pictures with?

16 A. I don't know if you would consider him a celebrity, Ted  
17 Mondale.

18 (Laughter)

19 Q. Is that -- Ted Mondale, is that -- this is the son of  
20 former Vice President Walter Mondale or vice president  
21 presidential candidate? I honestly don't remember.

22 A. No, son of Walter Mondale.

23 Q. Okay. But Walter Mondale was a political figure, right?

24 A. Right. Yes.

25 Q. And so his son was pictured with Tom Petters; is that

Lindstrom - Cross

1 right?

2 A. I believe so, yes.

3 Q. And is it true that his son actually worked at PCI or at  
4 one of Petters' companies?

5 A. Yes, actually two of them.

6 Q. Oh, two. Which companies did Mr. Mondale work at?

7 A. Well, Ted, I believe, worked with Petters Group. And  
8 then there was his brother Bill that also worked there, but  
9 I do not remember which company it was for.

10 Q. And I guess, Mr. Mondale -- I don't know. I guess  
11 celebrity would be strong, but he was a public figure at the  
12 time?

13 A. Yes.

14 Q. And do you know if he did any actual work for  
15 Mr. Petters?

16 A. I do not know if he did or not.

17 THE COURT: You are asking about the vice  
18 president?

19 MS. GITTES: Excuse me. I was asking about the  
20 vice president's son who worked at PCI. I apologize,  
21 Your Honor.

22 BY MS. GITTES:

23 Q. But you understood that Mr. Petters had a charity,  
24 right?

25 A. Yes.

1 Q. And that he would host big fundraising events, like  
2 parties and polo matches, right?

3 A. I don't know about polo matches, but, yes, he did have a  
4 big gala.

5 Q. And he sometimes had celebrities come to that kind of  
6 event?

7 A. Yes.

8 Q. And you testified, in response to questions from  
9 Mr. Anthony, about wire transfers, right?

10 A. Yes.

11 Q. And specifically wire transfers that involved M&I Bank?

12 A. Yes.

13 Q. And I think you said that you would sometimes speak to  
14 members of M&I's wire department; is that right?

15 A. Correct.

16 Q. But those calls were limited to information about the  
17 specific wire, right?

18 A. Yes.

19 Q. You didn't talk to anyone in M&I's wire department about  
20 PCI's business?

21 A. No.

22 Q. Or anything else going on at PCI?

23 A. No.

24 Q. And you don't remember the names of anyone in M&I's wire  
25 department sitting here today?

Lindstrom - Cross

1 A. No.

2 Q. It was a long time ago.

3 Do you recall anyone at M&I who -- anyone who  
4 worked at M&I at the time from your experience working  
5 there, do you remember anyone from M&I who worked with  
6 Petters?

7 A. The only one that comes to mind, and I'm not positive on  
8 the last name --

9 Q. Uh-huh.

10 A. -- but the first name was Ed.

11 Q. Could that have been Ed Jambor?

12 A. That's the one that comes to mind, yes.

13 Q. And you sometimes saw that Mr. Jambor would -- he would,  
14 you know, stop by PCI's office on occasion; is that right?

15 A. Yes.

16 Q. You never discussed PCI's business with Mr. Jambor,  
17 right?

18 A. No.

19 Q. So just before I finish, you worked beginning in 2002 --  
20 in September of 2002, if I have it right, at the Fingerhut  
21 building in Minnetonka; is that right?

22 A. Yes.

23 Q. And is that the building where you recall Mr. Jambor  
24 occasionally stopping by to see Mr. Petters or Ms. Munson?

25 A. Yes.

1 Q. And so if I call that the Fingerhut building, is that  
2 what you would have called it at the time?

3 A. Yes.

4 Q. Because it was a building owned by Fingerhut that became  
5 something owned by Petters once he bought the company?

6 A. Yes.

7 Q. And so just to kind of walk the jury through what a  
8 visitor at PCI like Mr. Jambor would have seen, that was a  
9 three-story building, right?

10 A. Correct.

11 Q. It was a pretty nice office building, right?

12 A. After it was remodeled, yes.

13 Q. But it was -- you know, it was freestanding; is that  
14 right?

15 A. Yes.

16 Q. Had its own parking lot?

17 A. Yes.

18 Q. And the building had offices for lots of Petters-owned  
19 companies, right?

20 A. Yes.

21 Q. And you said you worked at the -- on the third floor at  
22 the time of the raid; is that right?

23 A. Correct.

24 Q. But did you always work on the third floor or did you  
25 work on the first floor before?

Lindstrom - Cross

1 A. First floor before.

2 Q. Okay. And so either on the first or the third floor,  
3 depending on your time there, there were other employees of  
4 other Petters entities kind of in the same general floor as  
5 you; is that right?

6 A. Yes.

7 Q. How many people do you think worked on a given floor  
8 during your time, like, let's say, from 2002 to 2008?

9 A. Anywhere from 50 to 100, maybe.

10 Q. So it was just a -- kind of a normal busy office  
11 building?

12 A. Yes.

13 Q. And so nothing about the office, when -- if you were a  
14 visitor walking in, would have alerted you to the fact that  
15 it was, in fact, the headquarters of a massive Ponzi scheme,  
16 right?

17 A. No.

18 Q. Okay. Thank you so much, Ms. Lindstrom. I appreciate  
19 your time.

20 MS. GITTES: That's all I have, Your Honor.

21 THE COURT: Anything further for this witness?

22 MR. ANTHONY: Just a few, Your Honor, and then  
23 we'll get you on your way.

**REDIRECT EXAMINATION**

BY MR. ANTHONY:

Q. You mentioned Ted Mondale, the son of Walter Mondale.  
Who did he work for?

A. Within the Petters companies?

Q. Yeah.

A. I believe it was Petters Group.

Q. Okay. And that Petters Group is different than PCI,  
correct?

A. Correct.

Q. All right. And you mentioned another company, Polaroid.  
That was in the Petters Group also, right?

A. Under Petters Group, yes.

Q. But that was not part of PCI, was it?

A. No.

Q. And who was heading up Polaroid? Do you remember?

A. No.

Q. Okay. And then there was Fingerhut. That was part of  
the Petters Group but also not part of PCI, correct?

A. Correct.

Q. And Sun Country, they had a lot of people working there  
because it was an airline and people getting you on and off  
planes, but that was part of the Petters Group, right?

A. Correct.

Q. Not part of PCI, correct?

Lindstrom - Redirect

1 A. Correct.

2 Q. And other than you and Ms. Munson/Ms. Coleman,  
3 Mr. Petters, who worked for PCI?

4 A. There was Deanna Coleman, myself, there was Bob White  
5 and Sandy Indahl.

6 Q. Okay. And Petters, Coleman, and White all went to jail?

7 A. Yes.

8 Q. And they were the officers of PCI, correct?

9 A. Yes.

10 Q. Now, you were asked if a -- the Fingerhut building, was  
11 that one the one on Baker Road?

12 A. Correct.

13 Q. Okay. So it's the location where all the Money Transfer  
14 Statements were going?

15 A. Yes.

16 Q. So if someone wanted to find out who -- actually how big  
17 PCI was or how many people worked there and wanted to  
18 distinguish it from all the other businesses, they could do  
19 that by simply asking someone like Mr. Petters or  
20 Ms. Coleman, correct?

21 A. Correct.

22 Q. So while a visitor coming into the building might not  
23 want to know about PCI or all these other companies, someone  
24 who was in the business of banking who was trying to sell  
25 something to these entities might want to know that,



1 correct?

2 MS. GITTES: Your Honor, objection, calls for  
3 speculation.

4 THE COURT: Overruled. You may answer if you can.

5 THE WITNESS: Could you repeat that?

6 BY MR. ANTHONY:

7 Q. Sure. If somebody other than a visitor, who was selling  
8 banking services to PCI and these other entities, wanted to  
9 distinguish between the group, it would have been easy  
10 enough to do just by asking questions, correct?

11 A. Correct.

12 Q. And if somebody who were trained in anti-money  
13 laundering techniques who was a visitor to the building,  
14 they might view these various entities in a different light,  
15 correct?

16 MS. GITTES: Objection, Your Honor, speculative  
17 and calls -- and lack of foundation.

18 THE COURT: Sustained.

19 MR. ANTHONY: Okay. I have nothing further,  
20 Your Honor.

21 MS. GITTES: Nothing further.

22 MR. ANTHONY: And may the witness be relieved?

23 THE COURT: Yes, you are excused. Thank you.

24 MS. GITTES: We'll just reshuffle for a moment.

25 Thank you, Your Honor.

1 THE COURT: Certainly. Members of the Jury, if  
2 you'd like to take a stretch, you should feel free to.

3 (Pause)

4 THE COURT: Are we ready to proceed?

5 MR. ANTHONY: We are, Your Honor. We had raised  
6 with your chambers over the lunch hour four issues  
7 involving -- before we call Mr. Kelley. I think two of  
8 those issues have been resolved, if I'm not speaking out of  
9 turn, Mr. Spehr.

10 MR. SPEHR: No, you are not. That is correct.  
11 Rich Spehr, Mayer Brown, for the defendant.

12 MR. ANTHONY: And two of those issues have been  
13 resolved, but we have two other issues that we need your  
14 guidance on. So how would you like us to proceed on those  
15 two other issues?

16 THE COURT: Let's come to sidebar.

17 Members of the Jury, we will take a break now, and  
18 hopefully it will not be a long one. Please remember the  
19 instructions that I have given you and continue to follow  
20 them.

21 THE LAW CLERK: All rise for the jury.

22 **IN OPEN COURT**

23 **(JURY NOT PRESENT)**

24 THE COURT: Okay. We are ready to proceed.

25 MR. ANTHONY: Thank you, Your Honor. Joe Anthony

1 for the plaintiff.

2 Your Honor, there were four issues that we raised  
3 with you and alerted counsel to. Counsel and I have spoken  
4 and the -- of the four issues that we raised, two of them  
5 counsel has agreed that he will not get into, which are:  
6 Evidence of recoveries, offsets, and reductions, which is  
7 item 2(b), as in boy, in our October 20, 2022 letter. And  
8 counsel has agreed not to get into item 2(c) or offer  
9 evidence on 2(c), which is evidence of investor complicity.

10 And if Mr. Spehr confirms that, then we can move  
11 to the other two, if that's okay with, Your Honor?

12 MR. SPEHR: That is correct, Your Honor.

13 THE COURT: Thank you.

14 MR. ANTHONY: So that leaves two issues,  
15 compensation and the PCI plea agreement. I'm going to start  
16 with the PCI plea agreement, Your Honor, because that's one  
17 that is the subject of a previous order by you.

18 It is our intention with Mr. Kelley, and I wanted  
19 to alert the Court to this so you're prepared, we're  
20 prepared, the jury is prepared when we get to it, we're  
21 going to offer the judgment of conviction, as your order  
22 suggests we do, and then we're going to ask that the  
23 instruction you said you would read when we did that be  
24 read. We are not going to attempt to offer the plea  
25 agreement for the reasons mentioned or stated in your order.

1           So that's that issue. Would you like me to step  
2       aside to do that, to argue that?

3           THE COURT: To allow opposing counsel to respond,  
4       you mean?

5           MR. ANTHONY: Yes.

6           THE COURT: Yes.

7           MR. SPEHR: Yes, Your Honor. Thank you.

8           So we do plan to offer the Plea Agreement and  
9       Sentencing Stipulations, which are DX-10036. They should  
10      come in, Your Honor. They are executed by Mr. Kelley as  
11      trustee of PCI. They should come in, I think fairly  
12      clearly, under Rule 801(b)(2) as an opposing party's  
13      statement. They are admissions of Mr. Kelley on behalf of  
14      PCI.

15           Thank you, Your Honor.

16           MR. ANTHONY: I'm not going to respond,  
17      Your Honor. I think your order addresses the issue and no  
18      need for me to argue it further, I don't think.

19           The other issue is compensation, Your Honor. We  
20      think that counsel intends to get into compensation earned  
21      and paid to Mr. Kelley for matters outside of the  
22      compensation paid to him in connection with this lawsuit.

23           He's being paid for his services in connection  
24      with this lawsuit and we think that's the issue about  
25      compensation to be addressed, not to get into what he was

1       paid for for the 14 years of work that he did unraveling the  
2       Petters Ponzi scheme. And all the hours and hours, the  
3       12,000, 14,000 hours he did doing that seems to us to be  
4       prejudicial, unnecessary, irrelevant.

5               What is relevant is what he's done in this case,  
6       how long he's done it, and how much he's been paid for it;  
7       and he's prepared to testify to that.

8               THE COURT: And --

9               MR. SPEHR: Sorry, Your Honor.

10              THE COURT: And that is relevant because?

11              MR. ANTHONY: And it would be as though any -- you  
12       know, he is spending time here. He is going to be paid for  
13       his time.

14              In opening statement from defense counsel it was  
15       suggested that he's going to get a windfall out of this, and  
16       it's relevant to show that he's getting paid on an hourly  
17       basis, that he's not getting a percentage of the recovery,  
18       which goes to his credibility.

19              And that's why what he is being paid for his time  
20       on this matter is relevant. But what he was paid for  
21       services he provided at another time and place for 14 years  
22       is not relevant.

23              MR. SPEHR: Thank you, Your Honor. I think --  
24       there are two issues here.

25              One is the point made by counsel that he is -- I

1 think the words were only being paid -- only is being paid  
2 for his time on, quote, this case is a bit misleading.

3 Mr. Kelley has been the trustee for PCI since  
4 2008. He was the trustee for the PCI Liquidating Trust.  
5 This case was filed in 2012. He was the trustee for the PCI  
6 Liquidating Trust at that time. Much of the work that  
7 Mr. Kelley has done on this case was as PCI liquidating  
8 trustee and perhaps even as receiver before he became  
9 trustee for PCI.

10 He was paid millions of dollars in connection with  
11 his work on this case before the confirmation of the  
12 bankruptcy plan. Now, I understand from the letter that  
13 counsel sent this morning that once the plan was confirmed,  
14 he is being paid, it sounds like, by the hour, but he is  
15 being paid.

16 And that brings me to the second point, which is  
17 both counsel, counsel that did the voir dire, Mr. Anthony,  
18 and Mr. Collyard opened for the plaintiff, suggested in  
19 quite strong and clear language that Mr. Kelley was not  
20 going to get, quote, a penny from this matter.

21 And I can read you the transcript reference --  
22 it's page 58 and page 59 of the voir dire transcript --  
23 where Mr. Anthony says, "Mr. Kelley is appointed by a  
24 federal court to his position, and he is charged with the  
25 responsibility of recovering money for PCI so it can pay

1 back investors and creditors who loaned money to PCI." No  
2 problem. That's fine.

3 "So Mr. Kelley is not going to be putting a nickel  
4 of this in his pocket. It's going to be the people who lost  
5 money and organizations that lost money, whether they be  
6 charitable or unions or teachers' unions." And we'll have  
7 something to say about that too.

8 But the point is they have raised this issue.  
9 They have created the impression for the jury, both in the  
10 voir dire and in the opening, that Mr. Kelley is a saint.  
11 And I'm sure he's great, but saint I'm not sure.

12 He is getting paid associated with this matter.  
13 He's been paid millions of dollars leading up to the time of  
14 the confirmation of the plan, much of it, at least a  
15 significant amount of it, associated with this litigation.

16 So thank you, Your Honor.

17 MR. ANTHONY: I appreciate counsel recalling my  
18 comments, but if he recalled them in context, it was not  
19 getting a nickel out of this, referring to recovery in the  
20 lawsuit, not getting -- he was going to get paid. Everybody  
21 knows people get paid for their time. That was taken out of  
22 context, I suggest, not intentional.

23 And there's some confusion here because I heard  
24 counsel say that what he got as liquidating trustee -- I  
25 could see if he made the argument that that was fair game,

1       that what Mr. Kelley got in his position as trustee.

2               But then he went beyond that and said, well, what  
3       he got as trustee, what he got as receiver, what he got in  
4       all these other positions that he was doing. That would be  
5       prejudicial because it would create the impression that he  
6       got a windfall from all this work that he was doing. That's  
7       simply not accurate.

8               What is accurate is for Mr. Kelley to get on the  
9       stand and say what he's being paid for, what he's been paid  
10      for in connection with this proceeding, and they can cross  
11      him on it.

12              And I think it might even be fair game for them to  
13      say what he's been paid as liquidating trustee, but  
14      certainly going beyond that to the other positions that he  
15      held would be inappropriate.

16              So I think it's more fair, more efficient to limit  
17      it to what he's being paid for in this matter, but we, of  
18      course, defer to Your Honor on that.

19              MR. SPEHR: Very briefly. I will take what I  
20      think was a stipulation by counsel, which is if I am limited  
21      to only what Mr. Kelley was paid as a liquidating -- as the  
22      PCI liquidating trustee, that's fine with us.

23              THE COURT: Okay. So there's no longer an issue  
24      of dispute?

25              MR. ANTHONY: I'm going to check with my client,



1 Your Honor.

2 (Plaintiff's counsel confer)

3 (Mr. Anthony and Mr. Spehr confer)

4 MR. SPEHR: Sorry, Your Honor. Just give me a  
5 minute to show counsel something here.

6 THE COURT: No worries.

7 (Mr. Anthony and Mr. Spehr confer)

8 (Mr. Anthony confers with Mr. Kelley)

9 THE COURT: It sounds to me that counsel is  
10 continuing to try to resolve this issue, and I'm going to  
11 give you time to do so. I'll give you ten minutes to do so.

12 MR. ANTHONY: Thank you, Your Honor.

13 MR. SPEHR: We will resolve it, Your Honor.

14 THE COURT: And we will resume, then, at 3:00.

15 (Recess taken at 2:52 p.m.)

16 \* \* \* \* \*

17 (3:01 p.m.)

18 **IN OPEN COURT**

19 **(JURY NOT PRESENT)**

20 THE LAW CLERK: All rise.

21 THE COURT: You may be seated. Counsel, have you  
22 reached a resolution on this matter?

23 MR. GLEESON: Judge, the door behind you stayed  
24 open. I don't know if you --

25 THE COURT: Oh, thank you very much.

1 MR. ANTHONY: Okay. May I proceed?

2 THE COURT: Yes, you may.

3 MR. ANTHONY: Counsel for the defendant,  
4 Mr. Spehr, and I have agreed that he can ask about the  
5 6.3 million received by Mr. Kelley in connection with his  
6 role as liquidating trustee. So that resolves the  
7 compensation issue, which leaves unresolved the plea  
8 agreement issue and I think Mr. Spehr has a comment he wants  
9 to make to reserve a right or two.

10 MR. SPEHR: Very briefly, Your Honor, just on the  
11 complicity point. I just want to make sure that we've  
12 reserved our positions and rights. Obviously, this is a  
13 continuing discussion in the case. So thank you.

14 THE COURT: And so your point is what?

15 MR. SPEHR: I'm agreeing that I'm not going to  
16 raise complicity with Mr. Kelley. I just don't want that to  
17 be used someday as an argument that we've waived the  
18 argument that we believe complicity should be in the case.

19 THE COURT: Oh, certainly.

20 MR. SPEHR: Yes. Thank you so much.

21 THE COURT: So is there any other ruling that  
22 needs to be made?

23 MR. ANTHONY: Yes, the plea agreement. The plea  
24 agreement -- is it just the convictions, the judgment and  
25 the conviction, as you said in your order, or are you

1 amending it to allow the plea agreement to come in?

2 THE COURT: Okay. I am not amending my ruling.

3 It is -- it remains.

4 MR. ANTHONY: Okay.

5 MR. SPEHR: Which is that the plea agreement  
6 doesn't come in; is that accurate?

7 THE COURT: (Nodding.)

8 MR. SPEHR: Okay. Very good. Thank you.

9 MR. ANTHONY: That's how I understood it also,  
10 Your Honor.

11 THE COURT: Thank you.

12 (Pause)

13 **IN OPEN COURT**

14 **(JURY PRESENT)**

15 THE COURT: Please be seated. Counsel, you may  
16 proceed.

17 MR. ANTHONY: Thank you, Your Honor. For our next  
18 witness, plaintiff calls Douglas Kelley to the stand.

19 COURT REPORTER: Would you raise your right hand,  
20 please.

21 (Witness sworn)

22 COURT REPORTER: Please have a seat. And once  
23 you're seated, pull that microphone right up to you. State  
24 your first and last name, and slowly spell them.

25 THE WITNESS: Douglas Kelley. D-o-u-g-l-a-s.

Kelley is K-e-l-l-e-y.

THE COURT: Counsel, you may proceed.

MR. ANTHONY: Thank you, Your Honor.

**(Douglas Kelley)**

**DIRECT EXAMINATION**

BY MR. ANTHONY:

Q. Mr. Kelley, you're here as in your capacity as the trustee of the BMO Litigation Trust, correct?

A. That's correct.

Q. So let's talk a little bit about your background and the events that led up to your becoming the trustee.

When were you born, sir?

A. 1946.

(Laughter)

Q. I had to say that to prove that you were older than me.

So -- all right. Where were you born and raised?

A. In Bloomington, Minnesota.

Q. Okay. Talk a little bit about your family, your father, your mother, what they did, what you did as a kid.

A. My dad was in the Air Force, so we -- I was born here and then lived in New York, Florida, Japan, California before coming back here to Minnesota. I didn't go to one school for a whole year until the 7th grade we moved so often in the Air Force.

Q. And where did you go to school when you got back here?

1 A. Bloomington High School.

2 Q. I assume you graduated?

3 A. Yes, I did.

4 Q. Okay. And your father's role or title in the service  
5 was what?

6 A. My dad was a Marine in the Pacific and World War II.  
7 And then after World War II he joined the Air Force, did a  
8 tour in Korea and two tours in Vietnam.

9 Q. Did you go to college?

10 A. I did.

11 Q. Where did you go?

12 A. University of Minnesota.

13 Q. And you graduated with a degree in what?

14 A. Political science was my major, and history and music  
15 history were my minors.

16 Q. You're a musician?

17 A. I was.

18 Q. Playing what?

19 A. I played clarinet and saxophone. Reeds generally.

20 Q. Okay. Any remarkable experiences during your musician  
21 days?

22 A. The high point was subbing for Doc Severinsen when he  
23 came here to Minnesota.

24 Q. Okay. So Doc Severinsen is going to require you to tell  
25 the jury a little bit about who he was. I knew he was with

Johnny Carson, but tell the panel who that is, Doc Severinsen.

A. Well, he was a famous band leader and he -- his main job was with Johnny Carson and he played that for many, many years, but he would travel. And he was also on the board of the Minnesota Orchestra when he came back to Minnesota.

Q. Okay. Now, you graduated in what year from Minnesota?

A. 1968.

Q. So that would have been right in the middle of the Vietnam War. What did you do when you got out of college?

A. I went to the Tetons and climbed mountains and waited for my draft notice to appear.

Q. And did it come?

A. Yes.

Q. And where did you end up serving, in what branch?

A. The United States Army.

Q. And did you -- were you stationed somewhere? Did you have to go to class somewhere or school? What happened?

A. Well, you start out in basic training. I did that at Fort Dix, New Jersey. Then I went to Officer Candidate School, which was at Fort Belvoir in Virginia, and I graduated from there.

Q. How did you do at the Officer Candidate School?

A. I was in the top three of my class, which meant I was a distinguished military graduate, which means you get your

choice of any job you want in the Army.

Q. Okay. So what did you choose?

A. I choose to go to Airborne School, Ranger School, and Special Forces training.

Q. Okay. So back in that day, did they have a name for that? Green Berets or anything like that?

A. Special Forces were Green Berets.

Q. Okay. And how long did you serve as a Green Beret or Special Forces?

A. I was in the service total for three years.

Q. Okay. And after you got out of the service, did you go back to school?

A. I did.

Q. And where did you go to school?

A. I went to the University of Minnesota Law School.

Q. And when did you graduate?

A. 1974.

Q. Okay. Now, you are not currently married, are you?

A. I am not.

Q. Okay. Do you have children?

A. I do.

Q. Their names and what do they do. How old are they?

A. I have a son Brett, who's 39, and a daughter Erin, who's 37.

Q. Okay. And your son, what does he do and what has he

done in his 39 years, briefly?

A. Well, he right after 9/11 joined the Army and spent a number of years in the Army. He was an Army Ranger, went to Afghanistan and was a Bronze Star winner in Afghanistan.

Q. What's he doing now?

A. He came back when he got out of the Army, went to St. Thomas Law School, and now he is a partner in my law firm.

Q. Okay. And how about your daughter? Tell us about her.

A. My daughter graduated from the University of Minnesota. She was going to go to law school and said, no, I don't think so. And so she went and became a firefighter, a wildlands firefighter for the United States Forest Service, which she did for a number of years.

Q. So you mentioned that you climbed the Grand Tetons. Are you also a mountain climber? Is that one of your hobbies?

A. Yes.

Q. And just briefly touch on some of the mountains you've actually gotten to the top of.

A. Well, there are 14 mountains in the world that are over 8,000 meters, which is 26,000 feet high. I -- in 1984 I climbed one of those which was in Tibet. Its name was Shishapangma, 26,400 feet high, and I did that without supplemental oxygen. And then I climbed a number of other big mountains all around the world. In 1986 I went to Mount



Kelley - Direct

1 Everest and tried to climb --

2 Q. Wait. Did you climb Mount Everest? How did you do?

3 A. I got about nine-tenths of the way up on the north face  
4 of Mount Everest, which is one of the hardest routes on the  
5 mountain, and then the monsoon came and dumped a whole bunch  
6 of snow and we had to get out because of avalanche danger.

7 Q. Ever run for public office?

8 A. Once.

9 Q. What office did you run for?

10 A. Governor of Minnesota.

11 Q. How did that go?

12 A. I came in third.

13 Q. So you didn't get elected governor, so what did you do  
14 with respect to your legal career?

15 A. Well, I was with a small firm for a while after I ran  
16 for governor and then --

17 Q. Did that firm have a name?

18 A. Mahoney, Walling & Kelley.

19 Q. Okay. And then --

20 A. And then that firm broke up and I started my own firm,  
21 which is now called Kelley, Wolter & Scott.

22 Q. Well, actually before -- between your -- coming back --  
23 did you work for a firm called Holmes Eustace?

24 A. Well, right out of law school I did. It was a very  
25 small firm called Holmes, Eustace, Kircher & Graven.

1 Q. Before forming the Mahoney, Walling & Kelley firm, did  
2 you work anywhere else?

3 A. Well, after I left the U.S. Attorney's Office, I was --

4 Q. We haven't even got to the U.S. Attorney's Office. When  
5 did you work there?

6 A. Well, I worked there from 1978 to 1958.

7 Q. Okay. So from 1978 to 1985 you worked at the U.S.  
8 Attorney's Office. What position or title or role did you  
9 have?

10 A. Title was Assistant United States Attorney. I was in  
11 the criminal division at the beginning and then later headed  
12 up the white-collar crime section.

13 Q. So tell the jury a little bit about what an Assistant  
14 U.S. Attorney in the criminal division and the one who heads  
15 up the white-collar crime division does day to day in their  
16 job. What do they do?

17 A. Well, you typically progress through. When you first  
18 start out as a new lawyer, probably prosecute we call them  
19 drugs and guns. You do drug cases and felons in possession  
20 of guns and those kind of cases. You kind of graduate up to  
21 bigger -- big drug conspiracies and then you go to  
22 white-collar crime, is kind of a typical progression, where  
23 you do fraud, mail fraud, and that kind of stuff. And  
24 that's what I did.

25 Q. Okay. So I'm going to ask that you slow down a little

1 bit, because the court reporter -- especially when you are  
2 using names of foreign countries and mountains, it's always  
3 difficult.

4 A. Sorry.

5 Q. If you'd just slow down a little bit.

6 All right. So did you ever have any significant  
7 cases while an Assistant U.S. Attorney?

8 A. Yes.

9 Q. Tell the jury about one or two of those cases.

10 A. I prosecuted in a courtroom just down the hallway here a  
11 mafia case in 1982 and I convicted a mafia member who was  
12 from the Kansas City Mob. And after his conviction, I was  
13 appointed by the Department of Justice to lead a grand jury  
14 investigation in Kansas City that looked into the hidden  
15 ownership of the Tropicana Casino in Las Vegas.

16 Q. Okay. You know, you said you had experience in  
17 white-collar crime. Now, a Ponzi scheme, is that  
18 white-collar crime?

19 A. Yes.

20 Q. Okay.

21 A. Uh-huh.

22 Q. So let's go back to your experience in white-collar  
23 crime. While you were in charge of the criminal division or  
24 as an assistant, did you have the opportunity to review  
25 Suspicious Activity Reports?

1 A. Yes.

2 Q. And tell the jury about what your experience was in  
3 reviewing Suspicious Activity Reports while you were with  
4 the U.S. Attorney's Office.

5 A. Well, I would get every month a stack of papers about  
6 this thick (indicating), about a little over an inch thick,  
7 from the FBI. And they would gather up the Suspicious  
8 Activity Reports that they had gotten from banks and they  
9 would share them with me to see whether or not the United  
10 States Attorney's Office was interested in any of the cases  
11 that showed up in the Suspicious Activity Reports.

12 Q. Did you ever see a Suspicious Activity Report involving  
13 millions and millions of dollars?

14 A. No.

15 Q. Okay. What types of Suspicious Activity Reports did you  
16 see that caught your attention or what types would tend to  
17 catch your attention?

18 A. Well, back then there were a lot of -- I'd say the most  
19 common things were teller thefts, which could be as low as  
20 \$500. The banks would file an SAR for that.

21 There were check kites. Check kiting was a fairly  
22 common thing and if -- five to ten thousand dollars would  
23 draw a Suspicious Activity Report.

24 And then embezzlements of various and sundry kinds  
25 would come across the transom as well.

1 Q. Now, after you -- I think you said you left in 1985 and  
2 that's when you set up your own law firm?

3 A. Yes.

4 Q. Okay. And then did you work for Senator David  
5 Durenberger's office for a while?

6 A. I did.

7 Q. And what was your position there?

8 A. I was chief of staff.

9 Q. And what was his role in the Senate at the time?

10 A. At the time I joined him, which was during the Reagan  
11 administration, he was chairman of the Senate Intelligence  
12 Committee.

13 Q. Okay. All right. So tell us a little bit about the  
14 firm that you're with now. The firm you're with now is the  
15 same firm that you have been with during the entire time of  
16 your trusteeship in the Petters Ponzi scheme, right?

17 A. That's correct.

18 Q. Okay. So tell us the name of that law firm?

19 A. Kelley, Wolter & Scott.

20 Q. And approximately how many lawyers, how many employees  
21 has it typically had over the last decade or so?

22 A. Well, it has varied a fair amount. But my partners were  
23 Steve Wolter and Dan Scott, and then we had a number of  
24 associates in the firm and then a number of contract lawyers  
25 as well. So we could have as many as 15, 18 lawyers at any

1 given time in that.

2 I also employed a lot of retired federal agents:  
3 Postal inspectors, who are really good at mail fraud; FBI  
4 agents and IRS Criminal Investigation Division agents, who  
5 are good at follow the money.

6 Q. So I was going to say tell the jury why -- what the  
7 nature of your practice is such that you are employing  
8 lawyers, investigators, accountants, forensic-type people.  
9 Describe your practice, what it's been for the last couple  
10 of decades.

11 A. I would say it's about 60 percent white-collar crimes,  
12 so federal crimes that occur in Minnesota and other places.  
13 And then litigation generally involving fraud that's complex  
14 litigation as well in civil courts.

15 Q. Finally, before we start talking about the Petters  
16 matter itself, tell the jury what, if any, significant cases  
17 you have been involved in in the last few years.

18 MR. SPEHR: Objection, Your Honor, relevance.

19 THE COURT: Overruled.

20 MR. SPEHR: Thank you.

21 THE WITNESS: I think one that many Minnesotans  
22 might recognize is I represented Patty and Jerry Wetterling  
23 at the time that we found Jacob's body, and that was in  
24 2016.

25 BY MR. ANTHONY:

1 Q. So for those -- so Jacob Wetterling -- just briefly, who  
2 was Jacob Wetterling and what happened?

3 A. Jacob Wetterling went -- disappeared in 1989, and nobody  
4 knew what had happened to him for 27 years. And his mother,  
5 Patty Wetterling, started a foundation called the Wetterling  
6 Foundation that talked about missing children and stuff, and  
7 she was fairly prominent. I would say that crime was one of  
8 the most iconic unsolved murders in the history of the  
9 state.

10 Q. Okay. So you represented the parents of Jacob  
11 Wetterling. And when did that resolve itself?

12 A. Well, in 2016 I got a call from the United States  
13 Attorney, who said, Come and visit me. I think we can do a  
14 plea bargain with an individual, whose name was Danny  
15 Heinrich, who was in federal prison -- or in federal jail at  
16 the time for child pornography.

17 And it turns out that the United States Attorney's  
18 Office had gotten some information. Essentially, there was  
19 a plea agreement in which he would plead guilty and Stearns  
20 County, the state -- or division, would drop the murder  
21 trial against him and then Heinrich would tell where Jacob's  
22 body was.

23 And those meetings took place in my office with  
24 Patty and Jerry Wetterling and the FBI and Stearns County.

25 Q. Okay. Did you charge the Wetterlings for that service

you provided?

A. I did not. That was my legacy case with them.

Q. Okay.

A. Pro bono.

Q. Finally, did you ever represent any boards or -- in the state of Minnesota?

A. Yes. I had a -- one client was the Board on Judicial Standards. That is the board which investigates complaints against State Court judges; and if there's any merit to them, then that board prosecutes the judges.

Q. Okay.

A. And I prosecuted a number of State Court judges over the decade I represented that client.

Q. Okay. So let's talk about how you came to be the receiver in the Petters matter, and then we'll talk about how you became the trustee in the bankruptcy of the Petters matter.

When did you first hear anything about Tom Petters having problems with federal authorities?

A. I was sitting in a meeting and everybody at the meeting said, Holy cow, there's a hundred FBI agents out at Tom Petters' place.

Q. Had you heard of Tom Petters' name before then?

A. Oh, yeah, I had heard his name, but I had no contact with him.



1 Q. Okay. So you're at a meeting. You heard what you  
2 heard. What happened then?

3 A. Well, I had an inkling about whether I'd ever be  
4 involved. Then the next day I got a call from another  
5 former Assistant United States Attorney, whose name was Jon  
6 Hopeman.

7 Q. What was his involvement?

8 A. Jon Hopeman had been hired by Petters to represent  
9 Petters, and Hopeman called me and said, Fredrikson, which  
10 was the law firm here in town that had represented Petters,  
11 has withdrawn, the general counsel has quit as a result of  
12 the search warrant. We need somebody to represent the  
13 corporations. And so he said, Would you come and have lunch  
14 with Tom Petters and I? And I did that.

15 Q. So you had lunch with Mr. Petters and Jon Hopeman, his  
16 lawyer. Do you recall what day that was?

17 A. That was -- so the search warrant was September 24th,  
18 which was a Wednesday, and we had lunch on a Friday.

19 Q. And that was the first time you met Mr. Petters?

20 A. Yes.

21 Q. How long did the lunch last?

22 A. I'd say an hour and a half.

23 Q. Tell the jury what the conversation was at that lunch  
24 that furthered your involvement in the Petters situation?

25 A. Well, Mr. Hopeman introduced me to Petters and then Jon

1 said, Hey, we need somebody to take care of these  
2 corporations. Would you consider that, Kelley? And, Tom,  
3 would you consider hiring him? So we did not cut a deal  
4 right then, but I said I would be interested and we would  
5 talk further.

6 Q. Okay. So after that meeting on -- I think you said it  
7 was two days after the 24th. That would have made it the  
8 26th. What happened next with respect to your involvement  
9 in becoming the receiver for the Petters operations?

10 A. The next day, Saturday morning, I was walking around  
11 Lake Harriet, and --

12 Q. With your dog?

13 A. With my dog --

14 Q. Okay.

15 A. -- and my friend.

16 Q. Okay.

17 A. And I got a call from Assistant United States Attorney  
18 Joe Dixon.

19 Q. And what did he say?

20 A. He said, essentially, We heard you met with Tom Petters.  
21 And to be brief, he said -- asked me if I had had any  
22 contact with Petters before this lunch. And I said, No. He  
23 asked me if I had represented any of Petters' corporations  
24 or anything like that. And I said, No. And he said, You  
25 know, we have the ability to forfeit all of everything in

Tom Petters' portfolio.

Q. What does that mean when you heard him say, we -- meaning the U.S. Government?

A. Yes.

Q. -- have the ability to forfeit, what does that mean?

A. So when you commit a crime and you -- and the proceeds of that crime, if you are convicted of the crime, the government can essentially take those proceeds, and that can be money or it can be corporations or it can be real estate or anything else.

But if -- once you're convicted, if those are the proceeds of the crime or if your crime is a high money amount crime, the government can get what's called a personal money judgment against you in the amount of the loss of the crime and then proceed to collect that from you in certain ways.

So Mr. Dixon said, Did you read the search warrant? Which the search warrant from the FBI had been published in the newspaper. And I read it and --

Q. So when you read the search warrant, you had a pretty good idea of what the government was alleging?

A. Yes. And I knew that the FBI was saying it was a \$3.5 billion loss.

Q. Okay. So here I am talking to Joe Dixon. He and I know what that means, and he's -- you know Mr. Dixon from the

U.S. Attorney's Office?

A. I had tried a number of cases against Mr. Dixon. We tried them together. And, yes, we knew each other for a long time.

And he said, We have the ability to forfeit all these things. And he recognized -- said, You know, we'd rather not forfeit everything. Sun Country is an ongoing business. Polaroid was an ongoing business. And, essentially, if you forfeited those and that became public, they'd have to stop functioning, essentially.

Q. So all those travelers for Sun Country would be in some foreign location and stuck there because the airline shut down?

A. That would be part of what would happen, if it happened.

So Joe Dixon said to me, essentially, If you can get Tom Petters to give up control of those corporations, we will refrain from forfeiting them.

Q. Okay. So this is on Saturday. You're walking around the lake. Did you then have a conversation or a meeting with Mr. Petters and his lawyer?

A. Yes.

Q. When did that occur?

A. So let me finish the end of the conversation --

Q. Sure.

A. -- with Mr. Dixon. And he said, So when will that

happen? And I said, Hey, I'll call Mr. Petters and I'll meet with him on Monday morning. And Dixon said, That's a lifetime away. I need the answer today.

Q. Oh, okay. So then what happened?

A. So I changed my plans for the afternoon, called Mr. Hopeman, and we met with Mr. Petters at his place on Lake Minnetonka.

Q. And what happened in that conversation?

A. Well, we sat down and I told him of my conversation with Joe Dixon, and Petters kind of wanted to know how much trouble he was in and --

Q. What did you say?

A. Well, Jon Hopeman, to my surprise, had not told him about the sentencing guidelines yet.

Q. Okay. So you've got to help us there.

A. Yep.

Q. Jon Hopeman had not told him about the sentencing guidelines yet. Tell the jury what the sentencing guidelines are.

A. So for each -- if you are convicted of a crime in federal court, there's --

Q. Slowly, please, for the court reporter.

THE WITNESS: Apologize.

A. If you are convicted of a crime in federal court, there is a set of guidelines that determine what your probable

1 sentence would be recommended to the judge, and it depends.

2 One of the big things in a fraud case is what is  
3 the loss. And the highest number in the federal sentencing  
4 guidelines at the time, I think, was 550 million. And  
5 here's Tom Petters at 3.5 billion.

6 And I told him, I said, I've only taken a quick  
7 look at the sentencing guidelines, Mr. Petters, but I  
8 believe your guidelines would be in the life in prison  
9 without a chance for parole.

10 Q. So --

11 A. And Mr. Petters, the blood drained out of his face and  
12 he kind of sat back in his chair and he said, Okay. What  
13 can we do about it? And I said, If you want to save the  
14 people that worked for you, give up control of your  
15 corporation so it doesn't get forfeited. And he tentatively  
16 agreed to it then.

17 Q. Okay. So how do you come into the picture? He's faced  
18 with the sentencing guidelines, life in jail. He's  
19 represented by a lawyer. What are you supposed to do at  
20 that point?

21 A. Well, he had originally talked to me about -- and Jon  
22 Hopeman had -- about representing the corporations. And so  
23 what Joe Dixon had said is: If you'll give up control of  
24 the corporations, then we won't forfeit them.

25 So I said to Tom Petters, If you are willing to

1 give that up, maybe we can save them. And he said he would  
2 do that and put me in control.

3 Q. Okay. So when did you -- so he agreed to put you in  
4 control to save the corporations. Did you then report back  
5 to the U.S. Attorney's Office, Mr. Dixon, that Mr. Petters  
6 was willing to give up control of the companies to you?

7 A. Yes.

8 Q. And when did you do that?

9 A. I did that after the meeting when I was driving home.

10 Q. Okay. So what happened next with respect to your  
11 becoming the receiver of the Tom Petters companies?

12 A. So my recollection is on Sunday morning I went down to  
13 the United States Attorney's Office with my partner, and we  
14 met with the folks down there and talked about how this  
15 would proceed, what they wanted to have in terms of  
16 documentation and so forth.

17 Q. When you say "they wanted to have," you mean the  
18 U.S. Attorney's Office, the government?

19 A. The U.S.'s Attorney, yeah.

20 Q. What did the government want?

21 A. They wanted to have some writing that would show that  
22 Petters was truly giving up control and that he couldn't go  
23 back on it.

24 Q. Okay.

25 A. And so we talked about what form that would be. Didn't

1       come up with an exact answer right then but had said, okay,  
2       what are we going to do.

3               And then in the afternoon after that meeting I  
4       went out and met with Jon Hopeman and Tom Petters, and I  
5       think I had the Lindquist & Vennum lawyer with me. And we  
6       went out to the headquarters out at 4400 Baker Road and met  
7       in Petters' office.

8       Q.   So was this on a Monday?

9       A.   No.   Sunday afternoon.

10      Q.   All right.   So -- and at that point did Mr. Petters  
11      agree to turn over control of the companies to you to meet  
12      the concerns raised by the U.S. Attorney's Office?

13      A.   Yes.

14      Q.   Okay.   So are you in discussions with the  
15      U.S. Attorney's Office at this time?

16      A.   Continuously.

17      Q.   Okay.   So what happens the next day, which is Monday,  
18      you know, four days after the raid, with respect to you  
19      becoming more involved in the Petters companies?

20      A.   Well, Petters had cleaned out his desk on Sunday  
21      afternoon and agreed to leave. And then we scheduled a  
22      meeting for first thing Monday morning at Baker Road,  
23      where --

24      Q.   When you say "we scheduled a meeting," who are we  
25      talking about?



1 A. It would be Tom Petters, myself, and the people in his  
2 company. And I informed the United States Attorney's Office  
3 that we were going to do that.

4 Q. And so did you have the meeting?

5 A. The meeting -- well, I had a meeting on Sunday night  
6 with the government. We talked about how we were going to  
7 go forward.

8 And then on Monday morning, I met with the  
9 employees, probably, I don't know, maybe 100 employees, and  
10 I think it was in the basement of the headquarters. Tom  
11 Petters was there, and he tearfully resigned and said, I'm  
12 turning over the business to Mr. Kelley and symbolically  
13 walked out of the room then.

14 And I basically told the employees, I will do what  
15 I can to keep the businesses running and to make sure that  
16 things will be done in an orderly fashion. You need to know  
17 we're going to cooperate with the feds. But if we do,  
18 hopefully we can keep these businesses going.

19 Q. When you say "cooperate with the feds," who do you mean  
20 when you say "the feds"?

21 A. I mean the United States Attorney's Office and the FBI,  
22 the IRS, and the postal inspectors.

23 Q. Okay. Now, at some point the Federal Court gets  
24 involved. When does that happen?

25 A. Well, later in that week -- the week would end on

1 September 30th, and then I think Friday was like  
2 October 3rd. Sometimes during that week, down in Chicago --  
3 Q. Are you the receiver at this point? Had you been  
4 appointed?

5 A. No, I am not the receiver.

6 Down in Chicago one of the creditors, who lived in  
7 Illinois, went to a Cook County State Court judge and got a  
8 receivership appointed about Petters Company, Inc.

9 And so I heard about that and I told the United  
10 States Attorney's Office here, and they were determined that  
11 this case should be venued in Minnesota and they should have  
12 control of it.

13 And so then they decided to get a temporary  
14 restraining order, and they went to Judge Ann Montgomery and  
15 I think she signed that on October 3rd, which was the Friday  
16 of that week, I believe.

17 Q. Okay. So now -- federal Judge Ann Montgomery, she's a  
18 United States District Court judge in Minneapolis?

19 A. Correct.

20 Q. Okay. And she's also a former U.S. Attorney, right?

21 A. Assistant United States Attorney, yes.

22 Q. Assistant, okay.

23 So when the U.S. Attorney's Office gets an  
24 injunction, what happens? Are you also made a receiver at  
25 the time?

1 A. Well, on Friday the judge signed the temporary  
2 restraining order. And then the government decided to make  
3 a motion as well to get a receiver appointed, and that  
4 motion was heard in front of Judge Montgomery on the  
5 following Monday morning.

6 Q. Okay.

7 A. Tom Petters was arrested that Friday, October 3rd, and  
8 put in the slammer.

9 Q. Okay. And so October 3rd he goes into jail. On Friday,  
10 on the 6th, Judge Montgomery issues a receivership order; is  
11 that right?

12 A. Correct.

13 Q. And --

14 A. I met with her in the morning, along with Joe Dixon and  
15 Jon Hopeman, so all parties were there. And the judge  
16 questioned me.

17 Q. Okay. About what?

18 A. She wanted to know and she wanted to make sure that I  
19 had no involvement with Tom Petters in the past before --  
20 and I told her, I said, I met him for lunch on the 26th of  
21 September and he's -- he was going to relinquish the  
22 property -- or all of his properties to us. And she said, I  
23 just want to make sure you had nothing to do with him  
24 beforehand. And I said, Absolutely nothing.

25 And so both the government and Petters recommended

me. I think the government submitted three names to the judge, and she decided to appoint me.

Q. Okay. Now, when you -- so you first become -- you become a receiver. And do you recall the day, roughly, you became a receiver? Was that on the 6th?

A. Monday, October 6th.

Q. Okay. And what did you know generally about this massive fraud that had taken place with Tom Petters when you first became a receiver?

A. Well, as I had mentioned earlier, I read the search warrant affidavit that goes along with the Complaint that was used to search his place and then also to arrest Petters, and that was quite a long document and it delineated the fraud in great detail and said that there was a \$3.5 billion loss. So that's what I knew.

Q. All right. So now you're the receiver. And what did you understand your job was as receiver of, let's call it, the Tom Petters operations?

A. So first I think we should explain to the jury that what -- a receiver is an arm of the court.

Q. Okay.

A. I work for the judge. But different than almost every other legal proceeding, where you don't go visit a judge unless you have both parties together, as the receiver I was allowed to and did go talk to the judge consistently about

1 decisions that were being made.

2 Q. Did she have to approve all significant decisions you  
3 made?

4 A. Yes.

5 Q. How did that work, that whatever you did as receiver she  
6 had to approve? And why is it done that way?

7 A. Well, because everything -- there's not a penny that's  
8 expended that doesn't have a court order, essentially. And  
9 so if you are going to do -- you know, you don't go say, I'm  
10 going to write a check for \$10. But you do say, Hey -- one  
11 of the early, early decisions had to do with Sun Country  
12 Airlines.

13 In the fall of 2008 Sun Country always has to  
14 borrow money in the fall to keep going because it's a low  
15 time for them. They needed a \$5 million loan. And, of  
16 course, since Tom Petters owned them, there was no way any  
17 bank was going to give them a loan.

18 So the president of Sun Country, Stan Gadek was  
19 his name, came to visit me and said, We need this or we're  
20 going to go under. And that's a decision -- I went to the  
21 judge and said, Judge, this is an iffy thing. I have  
22 consulted with some consulting experts who say, What?  
23 You're going to lend money to an airlines in the  
24 financial -- middle of the financial crisis?

25 And Judge Montgomery said, What are you -- what do

you want to do? What do you think is wise business-wise?

And I said, I've got a lot of confidence in Sun Country. I think we should lend them the money.

So we did. Sun Country survived. And the judge was a part of that decision. And that was sort of typical of the kinds of decisions which I would talk to her about. I think we saved 750 jobs when we did that. Sun Country is alive and well today.

Q. So when the judge issued the temporary restraining order and appointed you as receiver, did she issue an order with respect to preserving documents and records?

A. Yes.

Q. And I think we saw that order in this case, and I'm not going to put it back up again, but tell the jury the importance in the business you were in of being receiver to having an order from a Federal Court judge that said you can't destroy documents, you must preserve all documents.

A. It was critically important that that order come out. We were scrambling to try to figure out where all the money had gone, and so we were trying to put together the records. And we knew then that the Ponzi scheme had been going on for 13 years, so trying to go back and find documents that were 13 years old was really a hard job.

But so I think the United States Attorney's Office publicized the order, which required -- anybody that had

anything to do with Petters or Petters' businesses or Petters' banks or anything like that was told you need to preserve all records with regard to Tom Petters.

Q. Okay. So tell the jury the first steps you took as the court-appointed receiver. What did the judge tell you your job was as receiver?

A. In simple terms, I was to gather up all of the property of Tom Petters, monetize it -- that means get it ready to be sold or whatever it took -- and to maximize the value of that. And then that would be paid back to creditors and others, people who had lost money from Petters.

Q. Did you do that all by yourself or did you have to hire some people to help you?

A. No way I could do that all by myself. Yes, I hired professionals.

I hired the law firm of Lindquist & Vennum, which had bankruptcy lawyers. It had -- a full service law firm in the Twin Cities that could do a lot of things. It helped me with real estate to be sold and all the other issues.

And a very critical thing was I hired accountants. I needed accountants terribly because we didn't know where all the money had gone. And Tom Petters had many different corporations, and so we had to find out which corporations or which people had gotten more money out from Petters than had -- than they had put in and which people had lost money.

And the reason it was so important to find out who were the net winners, that is, got more money out than they had put in, was because we had two years to file lawsuits against those people under the bankruptcy rules, two years to file the clawbacks.

Q. So that meant you had to take action quickly?

A. Yes.

Q. So did you hire -- did you interview and hire an accounting firm that knew what it was doing?

A. I did.

Q. Who did you hire?

A. We interviewed a number of big firms. And I was impressed by PricewaterhouseCoopers and I had an instant rapport with the partner that had come from New York, who had a very extensive background in forensic accounting and had been involved in a number of big, important cases. He and I hit it off and --

Q. Was that Zack Kiefer, the young man we saw here today, or --

A. No. Zack -- I don't think Zack was -- well, he was an intern then. The person who I hit it off with was Ted Martens.

Q. Is Mr. Martens in the courtroom?

A. Yes.

MR. ANTHONY: Mr. Martens, I think you raised your



1 hand before. You're back there in the corner.

2 THE WITNESS: Mr. Martens is a vet.

3 BY MR. ANTHONY:

4 Q. Tell us about Mr. Martens and why you hired him.

5 A. As I mentioned, because he had --

6 MR. SPEHR: Objection, relevance.

7 THE COURT: I didn't hear you.

8 MR. SPEHR: I said objection, relevance as to the  
9 reason why Mr. Martens was hired by the trustee.

10 THE COURT: Overruled.

11 THE WITNESS: I think we needed a big accounting  
12 firm because it was going to take a lot of manpower, and Ted  
13 had a lot of experience doing these kinds of complicated  
14 things and I just had a lot of confidence in him personally.  
15 So I hired PricewaterhouseCoopers.

16 And right off the bat we met with the government,  
17 and the goal was -- I said, we need to know who the net  
18 winners are so we can sue them. And that's what they  
19 started doing.

20 BY MR. ANTHONY:

21 Q. Okay. So tell the jury a little bit about the various  
22 businesses that came under your jurisdiction as receiver.

23 A. Well, there were two entities. One was PCI that you  
24 have heard about testified here and it's the subject of this  
25 lawsuit. And the other one was Petters Group Worldwide.

1           Petters Group Worldwide had a whole bunch of  
2           companies underneath it, and that's where Polaroid was and  
3           that's where -- Sun Country was separate in an aviation  
4           part. But Polaroid and then there were a number of other  
5           companies that were in -- under that umbrella.

6           So the receivership included those two companies  
7           and any of the subsidiaries that were under them, or  
8           affiliates.

9           Q. Okay. So your job was to untangle the Petters Ponzi  
10          scheme. What were your initial impressions with respect to  
11          the Petters Ponzi scheme? Was it simple or complex?

12          MR. SPEHR: Objection, Your Honor, relevance.  
13          He's not here as an expert.

14          THE COURT: Overruled.

15          MR. SPEHR: Thank you.

16          THE WITNESS: The org chart was complicated. The  
17          scheme was simple.

18          BY MR. ANTHONY:

19          Q. Okay. What was the scheme?

20          A. The scheme was to get people to invest money and Petters  
21          would pay off -- every one of Petters' businesses was  
22          losing money, and they were losing money from the beginning  
23          almost. And so Petters would get money in, and he would go  
24          out in these money-losing efforts and pretty soon he was in  
25          debt like crazy.

And the new investors would be lied to. They would be told we're going to buy TVs and you'll get an interest in the TVs. And instead he would use the new money to pay off the old investors whose notes had come due.

And -- pretty simple. Named after Ponzi, who was a famous guy who was doing this --

Q. How long had the Ponzi scheme idea been around?

A. Well, Ponzi was a guy who was convicted in Boston during World War I for buying war bonds and doing other things. So the Ponzi schemes had been around for a while.

Q. Okay. So we've heard some testimony about Petters buying electronics or purporting to buy electronics. What did you discover he was doing with the money as opposed to buying electronics with it?

A. Well, he was using some of it personally in a very lavish lifestyle and then, as I mentioned, he was using it to pay off old investors.

Q. Okay. Now, at some point, as receiver, you made a decision to put PCI and other Petters companies into bankruptcy; is that correct?

A. Yes.

Q. How long after you were appointed receiver and had been functioning as receiver was it before you put PCI into bankruptcy?

A. I don't remember the exact date, but I think it was

1 within a week or ten days of the date that I was appointed  
2 receiver.

3 Q. Let's discuss your reasons for doing that. Why did you  
4 put PCI into bankruptcy?

5 A. Well, the first thing that happened, as soon as people  
6 heard that the search warrant had been executed, people  
7 started suing Petters companies all over the country. And  
8 I'd get a call and somebody would say, You have to be in  
9 New York court first thing tomorrow morning. There's going  
10 to be a TRO hearing. And then I'd get one in San Francisco  
11 and one in Chicago.

12 So one of the things that bankruptcy does is it  
13 stops all other lawsuits and everything has to come to the  
14 place where the bankrupt company has been put into  
15 bankruptcy.

16 So that stay on lawsuits was really important to  
17 us, and it also consolidated things here so we didn't have  
18 to spend money hiring lawyers in all these different states  
19 and defending them there.

20 Q. And you had professional advice when you made that  
21 decision?

22 A. Yes.

23 Q. And did you have to get approval from the federal  
24 District Court when you made that decision?

25 A. Yes.

1 Q. Okay. So you get professional advice as to what should  
2 be done with the company, your recommendation is it go into  
3 bankruptcy, and then you run it by the federal judge, who  
4 then has to approve it, correct?

5 A. I did then, yes, yeah.

6 Q. Okay. So you were approved -- so the Federal Court  
7 approved you putting PCI into bankruptcy?

8 A. Yes.

9 Q. Okay. And -- now, once you put a company into  
10 bankruptcy, even if you are the receiver, does that mean you  
11 automatically become the trustee?

12 A. No.

13 Q. What has to happen before you, who just put the company  
14 into bankruptcy, can become the trustee?

15 A. Well, there was quite a big fight about that. And in  
16 order to be a trustee, the U.S. Trustee's Office --

17 Q. Tell the jury what the U.S. Trustee's Office -- we heard  
18 about the Assistant U.S. Attorney's Office. We heard about  
19 the Federal Court. What's the U.S. Trustee's Office?

20 A. I was just about to do that.

21 Q. Oh, yeah.

22 A. It is an arm of the Department of Justice, and they  
23 screen people to be trustees. You have to be on a list and  
24 so forth.

25 And as I had told Judge Montgomery, I had not been

1 in Bankruptcy Court a day in my life as a lawyer. She  
2 basically said, That's okay. You know criminal law. You  
3 know forfeiture. You know civil law. You can hire  
4 bankruptcy lawyers and they will help you.

5 So the bankruptcy lawyers helped and they decided  
6 that it would have been kind of crazy to have somebody  
7 different as a trustee than the receiver because we'd be  
8 trying to do the same things and tripping all over each  
9 other. So the United States Trustee's Office decided to  
10 nominate me as trustee, and they did.

11 Q. Okay. So you were nominated. Does the Bankruptcy  
12 Court -- is there a Bankruptcy Court judge who then has to  
13 approve it?

14 A. Yes.

15 Q. So the Federal Court judge approves you being receiver  
16 and then the Bankruptcy Court judge approves you becoming  
17 trustee?

18 A. True, yes.

19 Q. Okay.

20 A. And there was quite a fight about that.

21 Q. Okay. All right.

22 A. A lot of the creditors did not want it, so we had a  
23 battle about that and it went to court and we had hearings  
24 on it.

25 Q. Okay. So now you're wearing two hats, one a receiver

hat and one a trustee hat. Explain to the jury how those positions differed and how you were fulfilling -- did you continue to fulfill both receivership position and trustee position for a number of years?

A. Yes.

Q. Okay. Explain how wearing these two hats, you had to coordinate those activities. What did you do as receiver and what did you do as trustee for PCI?

A. So one part that we haven't talked about much, though, is I was named receiver for PCI and PGW, but also for Tom Petters, Deanna Coleman, Bob White, Jim Wehmhoff, and Catain is the last --

Q. Michael Catain?

A. Michael Catain.

Q. Tell the jury about what that meant when you are receiver for all these different people or entities, what you have to do.

A. So the first thing we had to do was to try to keep the people -- and a number of those folks pled guilty early on. Tom Petters didn't, but a number of them pled guilty.

And we were trying to gather up their assets, and that took a couple of years and that meant chasing down Ferraris in Los Angeles and Bentleys all over the country that people owned; real estate, real estate all over the world, real estate in the Caymans, Florida, Switzerland, all

1 kinds of different places.

2 Q. Just so I understand it, so Petters, Coleman, White,  
3 Catain, Wehmhoff, they have assets located throughout the  
4 world, like houses, cars, fancy cars. And your job as  
5 receiver is to do what?

6 A. Well, I've got to take control of all their property.  
7 And, of course, they weren't too happy about it and weren't  
8 always cooperative, so -- and that's where the former  
9 federal agents that I had hired, the FBI and IRS CID guys,  
10 were really great at tracking down the money and tracking  
11 down the titles and that kind of stuff. And so that was  
12 going on in the receivership, and I'd say that took a lot of  
13 time and we collected a lot of money doing that.

14 Meanwhile, then, in bankruptcy -- so the  
15 bankruptcy thing started and we started to go through the  
16 process there. So we had to figure out and file our  
17 lawsuits and do that. And that process proceeded at pace.

18 That was controlled by Judge -- Bankruptcy Judge  
19 Kishel, who is in this building here on a different floor;  
20 whereas, the receivership was in Minneapolis with Judge Ann  
21 Montgomery.

22 Q. So when you did something as trustee of significance, an  
23 important decision as trustee, did that have to get approved  
24 by Judge Kishel, the bankruptcy judge here in St. Paul?

25 A. Yes. You could make -- so in a Chapter 11 bankruptcy



1 that you are running a business, so you have a Polaroid  
2 going, you don't have to go to the judge for every check  
3 for --

4 Q. Can you slow down just a little bit?

5 A. Sorry.

6 THE COURT REPORTER: You're giving me a workout.

7 BY MR. ANTHONY:

8 Q. When she smiles, that's a good sign that she wants you  
9 to slow down. So I don't mean to be rude, Mr. Kelley, but  
10 I'm going to try to slow you down. I know it's hard, but do  
11 your best. Okay.

12 MR. SPEHR: I'll just make my relevance objection  
13 again, 403, Your Honor. This is -- I've made my objection.

14 THE COURT: Overruled.

15 MR. SPEHR: Thank you.

16 BY MR. ANTHONY:

17 Q. All right. Go ahead.

18 A. I forgot the question, Mr. Anthony.

19 Q. Okay. You were talking about what you were doing as  
20 receiver to gather up assets and things of that nature.  
21 Does that help you?

22 A. I think you were transitioning to what's going on in the  
23 bankruptcy?

24 Q. Right. And I said: Did you have to get approval from  
25 Judge Kishel? And you did that?

1 A. Yes. So you don't have to have approval for every  
2 single decision. So every payroll in Polaroid, if it's in  
3 the normal course of business, that's fine. But when you  
4 are going to make a significant decision, like settle a case  
5 or, you know, a number of those kinds of decisions, those  
6 have to be done. And if you are going to pay people, pay  
7 professionals and others, those all have to be approved by  
8 the judge, every penny.

9 Q. All right. And did you follow that process with respect  
10 to everything you did in the Bankruptcy Court, everything  
11 you did that needed to be approved was approved?

12 A. Yes.

13 Q. All right. So you mentioned part of the job was  
14 determining net winners and losers, and I want to ask you to  
15 talk to the jury a little bit about that.

16 Why was it important for you, as bankruptcy  
17 trustee, to determine what you called net winners and  
18 losers? So tell the jury what net winners are and then what  
19 net losers are as you're using that term.

20 MR. SPEHR: In what -- objection, relevance. In  
21 context, Your Honor, I'm not sure what --

22 THE COURT: Sustained.

23 MR. SPEHR: Thank you.

24 BY MR. ANTHONY:

25 Q. Okay. You mentioned that some -- you started some

1 lawsuits to recover money from people who had made money.

2 Do you recall that?

3 A. Yes.

4 Q. And were those the net winners?

5 A. Yes.

6 Q. Okay. So tell the jury what you meant when you used the  
7 term "net winner."

8 A. So if you loaned Petters \$1 million and you were going  
9 to charge him 20 percent interest, if he paid your principal  
10 back, that million dollars, and paid you the interest, so he  
11 would pay you back 1,020,000 [sic], and then you stop doing  
12 business with Petters, they would be a net winner to the  
13 tune of the 20 percent interest that they received.

14 Q. Right. So if it was a \$1 million loan and they got  
15 20 percent interest, that's \$200,000, right?

16 A. Yep.

17 Q. And so the \$200,000 would make them net winners?

18 A. Correct.

19 Q. Okay. And so why were you trying to get money back from  
20 the net winners?

21 A. So frequently in Ponzi schemes --

22 MR. SPEHR: Objection, Your Honor, relevance. It  
23 also calls for, I think, a legal conclusion or at least  
24 that's implicit in the question.

25 THE COURT: Overruled.

MR. SPEHR: Thank you.

THE WITNESS: In a Ponzi scheme, typically -- and this one had supposedly gone on for 13 years -- people who got in and out early, when they were overall done they got 100 percent, they got all their principal back and they got all their profits. And some people had hundreds of millions of dollars of profit.

But if you were at the end of the Ponzi scheme and you invested money, and when things stopped you didn't get any of your principal back and you didn't get any of your interest back, you were a net loser.

BY MR. ANTHONY:

Q. And why couldn't you leave people where you found them? Why did you have to go after the net winners?

A. The law is that the net winners have to give their profits back and those are distributed then to the net losers. And so that's the game that we were playing.

Q. Okay. And so tell the jury what Mr. Martens' role was in identifying the flow of funds in the trustee --

THE COURT: Counsel, let's have sidebar.

**(At sidebar)**

MR. SPEHR: This is just so far afield. I mean, I think some of this is interesting for the jury in terms of what he did as a trustee or a receiver, but this is going beyond that. He's talking about what Mr. Martens is doing.

1 He's an expert here. He's going to testify.

2 Am I speaking loudly enough?

3 COURT REPORTER: Just a little bit more.

4 MR. SPEHR: Okay. I'm sorry.

5 Now he's going into what Mr. Martens did. He

6 tried to talk about his relationship with Mr. Martens.

7 Mr. Martens is an expert. He's going to testify here. He's

8 going to be cross-examined.

9 I'm not sure what the relevance of any of this and

10 I have been, I hope, very judicious in my objections, but

11 I'd just like to get to the point. I've got a very short

12 cross-examination for the witness. It's going to be well

13 less than an hour, maybe less than 45 minutes.

14 And I think we're building him -- he's building

15 him as this incredibly credible person, and that's fine, I'm

16 sure he is, but it's not relevant to the issues in this

17 case.

18 MR. ANTHONY: The net losers and the net

19 winners -- the net winners and the net losers are the heart

20 of the case. That's why this lawsuit is here. He's

21 explaining that he had to go figure out who the net winners

22 are, get the money back from them to give it to the net

23 losers. And he's going to talk about how the net losers are

24 the ones that are going to be the beneficiaries of all of

25 his activity here.

~~Kelley - Direct~~

1 MR. SPEHR: Which is exactly what Martens is going  
2 to testify about. It's the entirety of his damages  
3 analysis, calculating the net cash losers. We have an  
4 expert. It is not Mr. Kelley and just he's -- it's creating  
5 an aura of credibility around this that this is for Martens  
6 to handle, not Mr. Kelley.

7 THE COURT: Well, first of all, I understand your  
8 objection. There is a need to ask questions and have the  
9 witness answer those questions --

10 MR. ANTHONY: Okay.

11 THE COURT: -- and not to testify in a narrative  
12 manner.

13 MR. ANTHONY: I'm trying to stop him. I'm trying.

14 THE COURT: Well, you need to maybe instruct him.

15 MR. ANTHONY: I will be better.

16 THE COURT: I will ask him as well or tell him.

17 I think the other point is by you questioning him,  
18 there can be the opportunity to direct the testimony. This  
19 narrative form is creating the basis for the objection.

20 MR. SPEHR: Yes, Your Honor.

21 MR. ANTHONY: That's a fair observation.

22 THE COURT: The objection is sustained. You are  
23 directed to engage in direct examination, question and  
24 answer, not inviting narratives.

25 MR. ANTHONY: I understand. Thank you.

1 THE COURT: Do you need to confer with your client  
2 or your witness?

3 MR. ANTHONY: I would like to do that because -- I  
4 would like to do that because --

5 THE COURT: I asked if he needs to confer with his  
6 witness. Do you have any --

7 MR. SPEHR: I have no objection to that. Let's  
8 just get to the point. We talked about this before --

9 MR. ANTHONY: Yeah.

10 MR. SPEHR: -- the witness was put on. We can do  
11 him very quickly. This is creating an aura, a sense that's  
12 just not relevant to the facts of this case.

13 MR. ANTHONY: I would welcome the opportunity to  
14 tell my client to let me ask the questions.

15 THE COURT: Well, you know what I think I will do?  
16 I will do that. Therefore, there's no -- it will be in open  
17 court. I will instruct the witness to allow his counsel to  
18 ask the question and to answer the question asked.

19 MR. SPEHR: Thank you, Your Honor.

20 MR. ANTHONY: Okay.

21 **(In open court)**

22 THE COURT: The Court will direct counsel to  
23 engage in direct examination, asking a question of the  
24 witness, and allowing the witness to answer to avoid  
25 narrative responses --

1 MR. ANTHONY: Thank you, Your Honor.

2 THE COURT: -- and testimony.

3 BY MR. ANTHONY:

4 Q. All right. Mr. Kelley, when we broke you were talking  
5 about identifying net winners and net losers, and then we  
6 talked about your hiring Mr. Martens to do some  
7 calculations. Do you remember? Let's go back to that.

8 On whose behalf are you bringing this lawsuit?

9 A. Well, as the trustee. The lawsuit here is on behalf of  
10 the BMO Harris Trust, Liquidating Trust.

11 Q. If there is any money collected as a result of that  
12 lawsuit, how is it to be distributed?

13 A. It will be distributed pursuant to the bankruptcy order  
14 in the bankruptcy case.

15 Q. And the -- tell the jury about that bankruptcy order.  
16 Is it an order issued by the bankruptcy judge based on a  
17 petition --

18 THE COURT: Counsel?

19 MR. SPEHR: Objection, Your Honor. Thank you.

20 THE COURT: Sustained.

21 BY MR. ANTHONY:

22 Q. Tell the jury about the bankruptcy order that oversees  
23 what you are --

24 THE COURT: The objection is sustained. Ask a  
25 question.



1 MR. ANTHONY: I will, Your Honor.

2 BY MR. ANTHONY:

3 Q. Is there a bankruptcy judge's order in this case that  
4 directs the manner in which the funds are to be distributed,  
5 if any are collected?

6 A. Yes.

7 Q. And are you obligated to follow that order?

8 A. I am.

9 Q. As you understand the order that you are required to  
10 follow, who will be the recipients or beneficiaries of any  
11 money collected in this case?

12 MR. SPEHR: Objection, Your Honor, legal  
13 conclusion, relevance, 403.

14 THE COURT: Overruled.

15 MR. SPEHR: Thank you.

16 THE COURT: You may answer.

17 THE WITNESS: There's a schedule of the people who  
18 have allowed claims, it's called, in bankruptcy. And so the  
19 jury knows, we had a plan that was confirmed in 2016, and  
20 that was an agreement by the parties to come up with a  
21 formula for who would get how much money.

22 Q. Okay. And is that --

23 A. That has been set in stone and that's the order now.

24 And everybody gets a certain percent. So if there's a  
25 distribution, money will be distributed pursuant to that

1 order, which was approved by the bankruptcy judge.

2 THE COURT: And I have -- I just want to instruct  
3 the witness I have directed counsel to ask questions so that  
4 we can avoid a narrative.

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: So please answer the questions.

7 MR. SPEHR: If I may, Your Honor? One second,  
8 please.

9 (Pause)

10 MR. SPEHR: May I approach, Your Honor?

11 THE COURT: You may.

12 **(At sidebar)**

13 MR. SPEHR: For years we have been trying to take  
14 discovery of who the beneficiaries of the BMO Trust are,  
15 what their percentage recoveries are, whether there was  
16 claims trading in the BMO Litigation Trust between and among  
17 so that -- the original beneficiaries, the eight investors  
18 you've heard so much about in this case, are actually not  
19 even in the trust any longer, are not beneficiaries of the  
20 trust.

21 We've asked -- we've tried to ask questions about  
22 it. We've never been permitted. And this witness is  
23 getting on the stand and he's testifying about the  
24 distributions that are going to be made and to whom they are  
25 going to be made. It's just --

1 THE COURT: Are you saying --

2 MR. SPEHR: It's unfair and prejudicial to us.

3 THE COURT: Is it relevant?

4 MR. SPEHR: I don't think the question of -- I  
5 think the question ultimately of who gets the money is  
6 relevant, but I don't know if he's going to testify to that  
7 or not testify to that. But I can't cross on it because I  
8 don't have discovery.

9 MR. ANTHONY: He hasn't identified anybody who is  
10 going to get the money. All he said is it's going to be  
11 distributed pursuant to the bankruptcy plan and order.

12 MR. SPEHR: That's fine.

13 MR. ANTHONY: That's all I'm going to ask him.

14 MR. SPEHR: That wasn't the last couple questions.  
15 The last couple of questions were how are the distributions  
16 going to work, who is the money going to go to. If that's  
17 the question and that's the only question, that's fine.

18 MR. ANTHONY: Well, I don't know if it's the only  
19 question because I'm trying to parse the questions in  
20 accordance with your order, Judge, to keep him from doing a  
21 narrative.

22 He's not going to identify any particular  
23 investors, lenders by name who are going to get money, if  
24 that's your question. He's not going to do that. I'm not  
25 going to ask him that.

THE COURT: Well, why don't you say without addressing who will receive the money so that we can be certain that that is --

MR. ANTHONY: I'm sorry, Judge?

THE COURT: I said address -- ask the question with a preface that instructs without providing the information --

MR. ANTHONY: The names, yes. I'll do that.

THE COURT: -- so that we can avoid your concern.

MR. SPEHR: That's fine for the moment. Thank you. We'll see where it goes.

**(In open court.)**

THE COURT: And I will direct counsel to pose the questions in a manner to avoid a narrative so that we have true direct examination.

MR. ANTHONY: Understand, Your Honor.

BY MR. ANTHONY:

Q. Mr. Kelley, without identifying the names of any entities or persons who will be receiving the money from the bankruptcy plan or order, can you tell the jury whether there will be any net winners receiving any money from the bankruptcy plan and order.

MR. SPEHR: Objection, form.

THE COURT: Overruled.

THE WITNESS: No net winners will participate in

the distribution.

MR. ANTHONY: Your Honor, at this point we're going to offer the judgment of convictions that we discussed previously, and I'm going to offer those as Exhibits -- do we have those numbers here?

(Pause)

MR. ANTHONY: Pursuant to the Court's order, we're going to offer Plaintiff's Exhibit 674, which is the judgment and conviction of Robert White.

THE COURT: I just need to confer.

(The Court and law clerk confer)

THE COURT: You may.

MR. ANTHONY: I'm waiting for counsel, whether they object or not.

MR. SPEHR: Oh, I thought you were going to read off all of them. No objection.

MR. ANTHONY: I'll read them all off and then he can respond. We'll offer Exhibit -- Plaintiff's Exhibit 676, which is the judgment and conviction of Deanna Lynn Coleman. We offer Plaintiff's Exhibit 677, which is -- actually, I think 677 and 676 are the same. So I'll go to 679, which is the judgment and conviction of Petters Company, Inc. Then 682, which is the judgment and conviction of Thomas Joseph Petters. I think those are the four.

MR. SPEHR: No objection.

THE COURT: And, Members of the Jury, the parties have introduced into evidence the criminal convictions of PCI, Thomas Petters, Deanna Coleman, and Robert White. Under the Federal Rules of Evidence, evidence of a final judgment of conviction can be used to prove any fact essential to the judgment.

I am instructing you that the following facts are essential to those convictions, in other words, you may infer that in finding PCI, Petters, Coleman, and White guilty, the following facts were admitted by those criminal defendants or proven beyond a reasonable doubt: They are:

Through September 2008 Thomas J. Petters was the owner, director, and CEO of Petters Company, Incorporated, PCI, and Deanna Coleman and Robert White were corporate officers of PCI. During that time Petters, Coleman, and White used PCI to operate a criminal scheme to defraud investors, also known as a Ponzi scheme.

Specifically, PCI obtained billions of dollars in money and property based on false statements to investors that PCI was purchasing consumer electronic goods from two supplier companies and then selling those goods to big-box retailers.

In connection with this scheme, Petters, Coleman, and White used fake purchase orders, invoices, and other

documents to fraudulently induce investors to loan money to  
PCI.

But rather than using the loan proceeds to  
purchase consumer goods for sale to retailers, Petters and  
PCI used the funds to, among other things, make lulling  
payments to investors and to pay themselves. In connection  
with the fraud, Petters or his co-conspirators caused money  
to be transferred to and from PCI's bank and accounts.

MR. ANTHONY: Thank you, Your Honor.

BY MR. ANTHONY:

Q. Now, Mr. Kelley, you caused PCI to plead guilty,  
correct?

A. Yes.

Q. Did you obtain permission of any judges or courts before  
doing so?

A. Yes.

Q. Which judge or court did you obtain permission from to  
plead PCI guilty?

A. Bankruptcy Court Judge Kishel.

Q. Okay. Did you plead PCI guilty pursuant to a  
coordination agreement between PCI -- between U.S. Trustee  
of PCI and the United States of America?

A. Yes.

Q. Would you turn to Exhibit 687 -- and I don't think this  
has been admitted yet, Your Honor -- in the book before you,

and tell the Court and the jury what Exhibit 687 is.

A. Exhibit 687 is an agreement between myself and the United States, and also I think there's another trustee in there who signed. And it delineates --

Q. Okay. Don't get into what it delineates. Let me ask you a question.

When did you enter into this agreement?

A. August 16, 2010.

Q. And you're looking at the last page of Exhibit 687?

A. Correct.

Q. And who are the parties whose signatures appear on this agreement?

A. Assistant United States Attorney Greg Brooker signed. I signed as receiver. I signed as bankruptcy trustee for PCI. And I signed as bankruptcy trustee for Petters Group Worldwide. And, lastly, John Stoebner, who was the bankruptcy trustee for Polaroid, was a part of this agreement.

MR. ANTHONY: Plaintiff offers P-687.

MR. SPEHR: No objection.

THE COURT: P-687 is received.

MR. ANTHONY: Would you publish this, please, Ms. Ellig.

BY MR. ANTHONY:

Q. So showing you the first page of Plaintiff 687, it's got



the names -- got the United States District Court up here.

Let's turn to page 2 and highlight the "Coordination" portion at the top. And turn to the second -- the third "whereas" clause on page 2, please.

In this paragraph, Mr. Kelley, it says, "Whereas," and then it has a number of words, and then it says, "the United States holds the statutory authority to forfeit proceeds of fraud and assets involved in or traceable to money laundering, including assets held by third parties, and contends that said authority vests in the United States the power to forfeit and seize all or substantially all of the assets of PGW and PCI upon conviction for the crimes now alleged." Do you see that?

A. I do.

Q. And what -- in the nature of this document, what does a "whereas" clause tell people who are reading the document?

A. I think it's to delineate facts which people agree on that lead to the agreement.

Q. Okay. Let's turn to the next page, page 3. And what would be the fifth "whereas" clause down, would you enlarge that, please.

That says "Whereas, the United States, Kelley, as the receiver and trustee, and Stoebner seek to maximize recovery to victims and creditors and minimize receivership and bankruptcy expenses through the coordination of their

1        respective efforts for the victims and creditors." You  
2        were -- are these "whereas" clauses typically discussed --  
3        were they discussed by you with the U.S. Attorney's Office  
4        before it was included in this document?

5        A. Yes.

6        Q. And then the next "whereas" clause, this talks about  
7        and, "Whereas, the United States Attorney's Office has  
8        sought to forfeit certain assets owned by individual  
9        defendants and will seek to return the proceeds of those  
10       forfeited assets." Do you see that?

11       A. I do.

12       Q. And then the last "whereas" clause on this page says,  
13       "Whereas, Kelley, as receiver, requires that this  
14       Coordination Agreement be contingent upon judicial approval  
15       of the agreement in the receivership action." What are you  
16       asking for there?

17       A. Well, in the receivership action, that would be Judge  
18       Montgomery, and I needed --

19       Q. Can you pull that microphone closer to you?

20       A. I would need to have her approval, Judge Montgomery's  
21       approval.

22       Q. Okay. Let's look at the next paragraph on "whereas" on  
23       the next page.

24                MR. ANTHONY: Enlarge that, please.

25       BY MR. ANTHONY:

1 Q. And this paragraph talks about your asking for  
2 Bankruptcy Court approval, correct?

3 A. Yes.

4 Q. And did you get District Court approval and Bankruptcy  
5 Court approval to enter into Exhibit 687?

6 A. Yes.

7 MR. ANTHONY: Okay. So go to Bates Number  
8 P687-0010 in this same document, please, Ms. Ellig. And  
9 highlight paragraph 4, please.

10 BY MR. ANTHONY:

11 Q. It says, "In exchange for the consideration set forth  
12 herein," and that sounds like legal lawyer stuff.  
13 Consideration is what?

14 A. Each side is giving up something in order to go into the  
15 agreement.

16 Q. Okay. And it says, "In an effort to maximize  
17 coordination and minimize unnecessary cost and undue delay  
18 in distributions, unless otherwise agreed by Kelley, as the  
19 receiver or as trustee, and the United States, the United  
20 States Attorney's Office agrees it will not pursue its  
21 forfeiture claims against third parties for the return of  
22 corporate asset transfers, including, but not limited to,  
23 the false profits or other clawback or avoidance claims,  
24 including principal from purported loans or investments in  
25 entities comprising the PCI estates or the PGW estate. The

1 U.S. Attorney's Office agrees to execute releases as are  
2 necessary and appropriate for the recovery of the foregoing  
3 assets." Was that an important provision to you as trustee  
4 of the PCI bankruptcy estate?

5 A. This was the most important part of this agreement.

6 Q. Why was it the most important part?

7 A. Because in a number of jurisdictions, the government and  
8 the Bankruptcy Courts were fighting over the assets. And,  
9 for example, in the Madoff case, the federal judge forfeited  
10 all of the --

11 MR. SPEHR: Objection, Your Honor.

12 THE COURT: Sustained.

13 BY MR. ANTHONY:

14 Q. Don't go into the Madoff case. Just say why it was  
15 important to you, as trustee, that this provision be in  
16 here.

17 A. So we would not fight about who got these things. The  
18 government agreed to give up the forfeiture, would not  
19 forfeit it out of the bankruptcy estate, and that was  
20 extremely important to the creditors' committee and to me as  
21 the trustee and receiver.

22 Q. So explain why it was important that the government not  
23 forfeit the assets. Why was that important to the  
24 bankruptcy estate?

25 A. Because the assets would stay in the bankruptcy estate

1 to be distributed pursuant to the bankruptcy procedures.

2 Q. Okay. And if the assets remained in the bankruptcy  
3 estate to be distributed pursuant to the bankruptcy  
4 procedures, then creditors would get the money as opposed to  
5 the government? Is that what you are saying?

6 MR. SPEHR: Object to the form.

7 THE COURT: Sustained.

8 BY MR. ANTHONY:

9 Q. So if the money stayed and the assets stayed in the  
10 bankruptcy estate, who would receive it? The government or  
11 the creditors?

12 MR. SPEHR: Same objection.

13 THE COURT: Sustained.

14 MR. ANTHONY: Your Honor, objection as to form or  
15 foundation?

16 THE COURT: Form.

17 MR. ANTHONY: In what respect is the form lacking?  
18 I think I can ask counsel that.

19 THE COURT: It's suggesting an answer.

20 BY MR. ANTHONY:

21 Q. Okay. Without me suggesting an answer, who would be the  
22 beneficiary of this paragraph 4?

23 A. Well, the bankruptcy estate would.

24 Q. And if the bankruptcy estate were the beneficiary,  
25 who -- without giving us any names -- would be the

beneficiary of that in the bankruptcy estate?

MR. SPEHR: Object to the form.

THE COURT: Overruled.

THE WITNESS: The creditors.

BY MR. ANTHONY:

Q. And creditors, is that a term -- what is -- what is a creditor?

A. A creditor is a person who is owed money by PCI or others.

Q. Okay. If the government forfeited all the assets of the bankruptcy estate, what, if anything, would be left for the creditors?

MR. SPEHR: Object to the form.

THE COURT: Overruled.

THE WITNESS: Well, if they took all of it, there would be nothing for the creditors.

BY MR. ANTHONY:

Q. Can you tell the jury why you pled PCI guilty.

A. Yes.

Q. Why?

A. Because, first of all, the United States had indicted PCI early on in this, and the government was insisting, in this agreement, that we plead PCI guilty in order for them to give up the forfeiture of the assets.

Q. And is that why you did it?

1 A. Yes.

2 Q. Now, did you do anything wrong -- let me rephrase that.

3 Did the government accuse you of doing anything  
4 wrong when you became receiver?

5 A. No.

6 Q. Did the government accuse you, when you were running  
7 PCI, of doing anything wrong when you were trustee in  
8 bankruptcy?

9 A. No.

10 Q. In your capacity as trustee of the BMO Liquidating  
11 Trust, you have brought this lawsuit, correct?

12 A. Yes.

13 Q. In your own words, tell the jury why you have brought  
14 this lawsuit.

15 A. Because my fiduciary obligation is to pursue all claims  
16 that are in the trust, and so we evaluated this claim. I  
17 felt there was a good-faith basis to bring this lawsuit, and  
18 so I authorized it to be brought.

19 Q. Did you follow a process in arriving at your decision to  
20 bring this lawsuit?

21 A. Yes.

22 Q. What process did you follow?

23 A. I asked the lawyers that I had to -- along with the  
24 forensic accountants at PwC, to analyze the financial  
25 transactions at M&I Bank --

1 Q. Okay.

2 A. -- and they did that.

3 Q. Stop there. Did they do that?

4 A. Yes.

5 Q. And what -- when they did that, what information were  
6 you made aware of?

7 MR. SPEHR: Objection, hearsay, relevance, 403.

8 MR. ANTHONY: It's nonhearsay. It's not offered  
9 for the truth. It's offered to show his state of mind and  
10 why he did what he did.

11 MR. SPEHR: We --

12 THE COURT: Sustained.

13 BY MR. ANTHONY:

14 Q. What information did you have that you based your  
15 decision on -- that you based the decision to move forward  
16 with this lawsuit?

17 MR. SPEHR: Same objections, Your Honor.

18 THE COURT: Sustained.

19 MR. ANTHONY: Is that form or foundation,  
20 Your Honor? And if it is foundation, where is --

21 THE COURT: I'm sorry. Overruled.

22 MR. ANTHONY: Thank you, Your Honor.

23 THE COURT: Thank you. I misspoke.

24 BY MR. ANTHONY:

25 Q. Okay. So what did you find -- what information did you



1 get that led you to file the lawsuit?

2 MR. SPEHR: Objection. May I approach?

3 THE COURT: You may.

4 MR. SPEHR: Thank you, Your Honor.

5 **(At sidebar)**

6 MR. SPEHR: So, he is relying entirely on the  
7 advice of his counsel, advice of his accountants. He's now  
8 going to testify, I presume, that he credibly relied on all  
9 this material that was provided to him and he authorized the  
10 filing of this suit. But it's way out of bounds.

11 It's -- he's not here as an expert. He's not here  
12 to talk about the facts of the case. He's here to tell us  
13 what he does as a trustee. And you've gotten from the  
14 witness already that he authorized the filing of this suit  
15 and believed it was authorized in good faith. That's fine.  
16 But what he relied on, what he was told by his lawyers and  
17 other advisors that caused him to file this suit I think is  
18 off limits for all the reasons I said; 403, relevance, I  
19 think it's hearsay.

20 MR. ANTHONY: Your Honor, if you remember the  
21 opening statement from defendant's counsel, the attacks on  
22 him, on Mr. Kelley as to why he started this lawsuit and how  
23 he was dredging up this thing, hindsight, after the fact,  
24 bias. I mean, he's entitled to say what facts motivated him  
25 and the reasons why he started this lawsuit. It's not going

1 to be a lengthy exposition. It will be a very short  
2 description of why he did what he did, and then they can  
3 cross him on it if they want.

4 MR. SPEHR: What's to cross him on? Are we going  
5 to get into the merits of the lawsuit? Should I start  
6 crossing him on PCI, on the transactions? Should I cross  
7 him on the investors, the multiple investor claims that he  
8 sought to disallow, all the adversaries he filed against,  
9 all of these investors who he's now acting as an agent for?  
10 All of that stuff is -- the Court has ruled is off limits to  
11 us. And now here it is again. It's an entirely one-sided  
12 exhibition in which you put your case on and I cannot cross  
13 on any of the other points as the Court has ruled that I  
14 cannot.

15 MR. ANTHONY: Okay. That's not --

16 MR. SPEHR: It's severely prejudicial.

17 THE COURT: So limit your questioning to elicit  
18 testimony about the scope of his role in this process  
19 without addressing the details of the crimes that were  
20 committed in the fraud.

21 MR. ANTHONY: He's not going to get into the  
22 crimes in the fraud, Your Honor. He's simply going to say  
23 that -- he's going to describe his -- he's the plaintiff in  
24 this case. He's entitled to describe why he brought this  
25 lawsuit as trustee. And that's all he's going to do. It's

1 not going to be -- you've heard a lengthy discussion about  
2 what they are afraid he's going to say. He's the plaintiff.  
3 The plaintiff always gets to describe why they brought the  
4 lawsuit.

5 MR. SPEHR: He's not --

6 MR. ANTHONY: Excuse me.

7 MR. SPEHR: I apologize. Yes. I apologize.

8 MR. ANTHONY: The plaintiff always gets to  
9 describe why they brought a lawsuit. That's all he's going  
10 to do. He's not going to get into a lengthy discussion on  
11 anything. He's going to explain why he brought this  
12 lawsuit, the reason he brought this lawsuit. And he's  
13 entitled to do that.

14 There couldn't be anything more basic or  
15 fundamental in a case than letting the plaintiff explain why  
16 they brought a lawsuit. They may not want to hear why he  
17 brought the lawsuit, but that's why they have  
18 cross-examination. He's entitled to explain why he brought  
19 the lawsuit, the reasons why he brought the lawsuit, and  
20 that's all he's going to do.

21 MR. SPEHR: He is not a victim. He's not a  
22 personal injury victim. He wasn't commercially injured.  
23 That is your typical plaintiff that testifies about, you  
24 know, what their claims are. Everything that he knows, he  
25 knows from his lawyers, advisors, consultants. Mr. Martens

Kelley - Direct  
1 is going to testify.

2 I have been barred from asking Mr. Kelley about  
3 all of the other lawsuits that he's filed. And for him to  
4 testify about this lawsuit and why he filed it and why he  
5 felt it was a meritorious lawsuit based upon what he was  
6 told from -- by his lawyers and his consultants is severely  
7 prejudicial under the rules that we're playing under, which  
8 is, I can't ask him about anything else.

9 MR. ANTHONY: Except the rules we're playing under  
10 now is an opening statement where he was attacked for his  
11 reasons for filing this lawsuit. Counsel for the defendant  
12 went over and over how Kelley had dredged this up and said  
13 this and done this and there was no merit to it and he  
14 didn't investigate it and it was after the fact. And you --  
15 you made that argument in your opening statement. And so  
16 he's entitled to a short, it's not a lengthy exposition, as  
17 to why he's doing what he's doing. And you can attack him  
18 on it, and you can question whether it's meritorious.

19 He's --

20 MR. SPEHR: So the door is now open --

21 MR. ANTHONY: Excuse me. Excuse me.

22 MR. SPEHR: Oh, I thought you were finished. I  
23 apologize.

24 MR. ANTHONY: He's not a personal injury  
25 plaintiff, but the injured party is PCI, and he's the only

1 person who can speak for PCI. He's the trustee for PCI. If  
2 he can't speak for PCI, no one can.

3 MR. SPEHR: PCI --

4 MR. ANTHONY: Excuse me. PCI is the injured party  
5 here. He's the representative of the injured party. As the  
6 representative of the injured party, PCI, he's entitled to  
7 say, PCI is bringing this lawsuit to recover the money that  
8 it can pay back to its creditors. He's entitled to say  
9 that. If he can't --

10 MR. SPEHR: This is the core -- I'm sorry. I  
11 thought you were finished.

12 MR. ANTHONY: If he can't say that, then who says  
13 it for PCI? I have no one else who can speak for PCI but  
14 him as trustee. The expert is going to talk about what he  
15 discovered when he looked at the forensics. The liability  
16 expert is going to talk about what she observed. But he is  
17 the only one who can speak for PCI. And to deprive the only  
18 person who can speak for PCI from speaking seems to me to be  
19 unfair.

20 MR. SPEHR: The problem is that he is not going to  
21 speak to any harm of PCI. PCI pled guilty to fraud. We  
22 will cover that in the cross-examination. The idea that he  
23 is here speaking for a victim is just simply not the case.  
24 PCI was a fraud. It pled guilty to fraud.

25 So the idea that he's here speaking as a victim --

1 I have no problem with what I thought you were suggesting,  
2 that he can talk about process, who he engaged, that he has  
3 lawyers, that he has an accounting firm in PwC, no problem.  
4 But when he starts to talk about what the claims are, what  
5 the merits of the case are, why he thinks they are  
6 meritorious and made in good faith, I think that crosses the  
7 line. I'll stop there.

8 MR. ANTHONY: PCI is the victim. There's no doubt  
9 about that. And he is entitled to say, as the victim, he's  
10 seeking to recover the 1.976 billion that has been lost.  
11 And he's also -- he can also say why he wants to do that.  
12 And why you would preclude the only spokesperson from the  
13 injured party from speaking is beyond me. I know why you  
14 don't want him to speak because then you want no one  
15 speaking for the plaintiff.

16 THE COURT: I am overruling the objection. I am  
17 directing you to narrowly direct this examination so that it  
18 is providing information to the jury that is essential for  
19 them to do their work but that is not prejudicial to the --  
20 more prejudicial than probative.

21 MR. ANTHONY: Okay. Thank you. I'll do that.

22 **(In open court.)**

23 MR. ANTHONY: Your Honor, I'm going to take a  
24 moment to go back and look at the last question where we  
25 were at, if I may?

Kelley - Direct

1 BY MR. ANTHONY:

2 Q. When we broke, Mr. Kelley, I had asked you what  
3 information did you have that led you to file this lawsuit.  
4 So what information did you have that led you to file this  
5 lawsuit?

6 MR. SPEHR: Note my continuing objection. Thank  
7 you, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: So the first piece of information  
10 that came to me came through the forensic accountants, and  
11 that evidence was presented to me. And it showed that there  
12 was a very high volume of money that went through the bank  
13 account. I think it was like 40 -- nearly \$40 billion. So  
14 that was the first piece of evidence that I got from them.

15 BY MR. ANTHONY:

16 Q. Okay. So that was one piece of evidence -- or facts.  
17 Any other facts that came to your attention?

18 MR. SPEHR: Same objection.

19 THE COURT: Overruled.

20 THE WITNESS: A question I asked was whether there  
21 had been any SARs filed, and I was told there were not.

22 BY MR. ANTHONY:

23 Q. Okay. That's the second piece of information. Any  
24 other facts come to your attention?

25 A. I'm sure that others were presented.

1 Q. I'm sorry?

2 A. I'm sure others were presented, but I don't have the  
3 recollection at the time. And obviously this is a decision  
4 for the jury to make, but I -- I had a good-faith basis then  
5 for saying go forth with the discovery in the case, and  
6 that's what I authorized.

7 Q. Okay. Now, are you claiming anyone from the bank --  
8 that -- let me rephrase this.

9 You were here to hear the testimony of certain  
10 bank employees, correct?

11 A. Yes.

12 Q. Are you claiming, in your lawsuit, that any of those  
13 persons who testified participated in a Ponzi scheme?

14 MR. SPEHR: Objection, Your Honor, relevance, 403,  
15 hearsay.

16 THE COURT: Overruled.

17 THE WITNESS: No.

18 BY MR. ANTHONY:

19 Q. Are you claiming that any of the people who testified  
20 from the bank received a bribe from anyone associated with  
21 Tom Petters?

22 A. No.

23 Q. Are you claiming that anybody who testified got tickets  
24 or food or beverages from anyone with the Petters  
25 organization?



1 A. No.

2 Q. And whether they testified or not, are you claiming that  
3 any M&I Bank employees took a bribe or was a participant --  
4 who knew that there was a Ponzi scheme that was going on?

5 A. No.

6 Q. We are -- what did BMO do or didn't do in general terms  
7 that you think caused losses to PCI?

8 MR. SPEHR: Objection, all the same bases; 403,  
9 relevance, hearsay.

10 THE COURT: Overruled.

11 THE WITNESS: I think they should have  
12 investigated much more fully. I think they should have  
13 reported this to the feds. And by that I mean by filing  
14 SARs or otherwise letting people know about what was going  
15 on. And I think they should have shut down the account.

16 MR. SPEHR: Move to strike. I hate to ask again  
17 to approach, Your Honor. I know it's getting late. I  
18 totally apologize, but...

19 THE COURT: You may approach.

20 **(At sidebar)**

21 MR. SPEHR: I apologize. He's got to prove his  
22 case with witnesses and documents. He's just -- he's  
23 offering his own opinion about what he saw and felt or he's  
24 told. It's just not relevant. It's severely prejudicial.

25 He spent an hour building him up as this, you

1 know -- as this, you know, tremendous trustee. John is  
2 going to join us now. And it's just -- it's just -- it's  
3 not relevant to anything, and it's all hearsay.

4 MR. ANTHONY: Your Honor, we could take him  
5 through each paragraph in the complaint and have him say  
6 what was alleged. We're not doing that. We've simply  
7 summarized what his position is.

8 I have no -- I don't think I have any more  
9 questions on this area. I think that's the extent of what  
10 we plan to do. I don't think it's -- I don't think he's --  
11 I don't think I went beyond the bounds of what you asked. I  
12 kept it pretty limited. I kept his narrative short. And I  
13 think that it was an appropriate response to the objection.  
14 I think it was an appropriate ruling, and I think we should  
15 move on and try to finish him up.

16 THE COURT: The objection is overruled. You  
17 should move on.

18 MR. ANTHONY: I will.

19 THE COURT: If you would like an instruction given  
20 to the jury, you can let me know about that and we can give  
21 it to them. I will review it if you -- and determine  
22 whether it should be given to the jury in the next session.

23 MR. SPEHR: Thank you.

24 THE COURT: Okay.

25 MR. SPEHR: We'll caucus. Thank you.

1                   **(In open court.)**

2                   THE COURT: Counsel, you may proceed.

3                   MR. ANTHONY: Thank you.

4                   BY MR. ANTHONY:

5                   Q. Is PCI making a claim for damages in this case?

6                   A. Yes.

7                   Q. And what is the amount of the claim?

8                   A. Well, as determined by the forensic accountants, it's  
9                   \$1.9 billion.

10                  Q. Okay. And by the "forensic accountants," you mean  
11                  Mr. Martens?

12                  A. Yes.

13                  MR. ANTHONY: Your Honor, if you'll bear with me  
14                  and give me a moment or two. I think I'm just about  
15                  finished.

16                  (Plaintiff's counsel confer.)

17                  MR. ANTHONY: I have nothing further at this time.  
18                  Thank you.

19                  MR. SPEHR: Thank you, Your Honor. We do wish to  
20                  question the witness.

21                  THE COURT: Yes, you may.

22                  MR. SPEHR: If you can give us a moment to  
23                  distribute things, that would be great.

24                  THE COURT: Absolutely.

25                  (Pause)

1 MR. SPEHR: May we proceed?

2 THE COURT: Yes, you may.

3 **CROSS-EXAMINATION**

4 BY MR. SPEHR:

5 Q. Good afternoon, Mr. Kelley.

6 A. Good afternoon.

7 Q. The BMO Litigation Trust, for which you are the trustee,  
8 is the plaintiff in this case, correct?

9 A. That's correct.

10 Q. And the BMO Litigation Trust, as you as trustee, is  
11 asserting claims against Bank of Montreal in this case --  
12 right? -- BMO Harris?

13 A. Correct.

14 Q. And in your capacity as trustee, I take it you would  
15 agree with me that you can only bring claims for harms to  
16 PCI?

17 A. Correct.

18 Q. So you would also agree with me, I take it, that as  
19 trustee of the BMO Litigation Trust, you can't bring claims  
20 on behalf of the eight hedge fund investors who claim to  
21 have lost money in the PCI scheme; is that correct?

22 MR. ANTHONY: Objection, objection, beyond the  
23 scope of the agreement with respect to investors,  
24 Your Honor. May we have a sidebar on this, Your Honor?

25 MR. SPEHR: I can respond here or approach,

1 Your Honor.

2 THE COURT: Let's approach.

3 **(At sidebar)**

4 MR. SPEHR: Your objection?

5 MR. ANTHONY: My objection is it's beyond the  
6 scope of what we agreed to; that you were not going to get  
7 into investors, and talking about the investors is out of  
8 bounds, I thought.

9 MR. SPEHR: No, I'm not entitled to get into  
10 investor complicity. I totally agree with that. I'm simply  
11 asking him as the trustee for the BMO Litigation Trust, is  
12 it the case that he does not have the ability to bring  
13 claims on behalf of the investors.

14 MR. ANTHONY: Objection, relevance because he's  
15 not bringing claims on behalf of the investors.

16 MR. SPEHR: I just want him to agree that he's not  
17 bringing an investor claim here.

18 THE COURT: Overruled. You may ask the question.

19 MR. SPEHR: Thank you.

20 **(In open court.)**

21 BY MR. SPEHR:

22 Q. So let me try the question again, Mr. Kelley.

23 You would agree with me, wouldn't you, that as the  
24 trustee of the BMO Litigation Trust, you can't bring claims  
25 on behalf of the investors who claim to have not been repaid

by PCI in this case? Do you agree with that?

A. Correct.

Q. So you can't bring claims for Lancelot, one of the eight hedge funds, right?

A. Well, in my trust, Lancelot is one of the -- the people who is owed money. So I'm not bringing it on behalf of them; but in the collective group, they will be one of the recipients if we recover any money. So, I mean, there's kind of a damages issue and a distribution issue.

Q. We're going to come to the --

A. Okay.

Q. -- litigation trust in a bit.

My question now is that if Lancelot, as an investor in PCI, came to you and -- as trustee and asked you to bring a claim on behalf of Lancelot, you couldn't bring that claim, correct?

A. That's correct.

MR. ANTHONY: Objection, repetitious, asked and answered.

THE COURT: Sustained.

BY MR. SPEHR:

Q. You agree with me that you cannot bring a claim on behalf of Lancelot in this case, correct?

MR. ANTHONY: Objection, repetitious, asked and answered.

1 THE COURT: Sustained. Move on, Counsel.

2 BY MR. SPEHR:

3 Q. Do you agree you can't bring a claim on behalf of Palm  
4 Beach in this case?

5 MR. ANTHONY: Objection, relevance.

6 THE COURT: Overruled.

7 BY MR. SPEHR:

8 Q. How about Acorn? Can you bring a claim on behalf of  
9 Acorn in this case?

10 A. No.

11 Q. How about Ritchie Capital?

12 A. No.

13 Q. Ark Royal?

14 A. No.

15 Q. How about Edge One?

16 A. No.

17 Q. Elistone?

18 A. No.

19 Q. Now, we discussed -- you discussed with your counsel  
20 earlier that PCI pled guilty to fraud, correct?

21 A. Yes.

22 Q. And you executed a plea agreement on behalf of PCI in  
23 order for it to plead guilty, correct?

24 A. Yes.

25 Q. And prior to executing that plea agreement, you

1 conducted, along with Mr. Martens and PwC, an extensive  
2 investigation into the Ponzi scheme, correct?

3 A. Yes.

4 Q. And that extensive investigation into the scheme caused  
5 you to plead PCI guilty, correct?

6 A. That was part of the cause.

7 Q. And you pled PCI guilty because PCI was guilty of fraud,  
8 correct?

9 A. That's part of the cause.

10 Q. And they were guilty -- and it was guilty -- I'm  
11 sorry -- of mail fraud, correct?

12 A. Yes.

13 Q. Conspiracy to commit mail fraud, correct?

14 A. Conspiracy to commit mail fraud and wire fraud, yes.

15 Q. That was going to be my next question. Also conspiracy  
16 to commit mail fraud, correct?

17 A. Yes.

18 Q. And conspiracy to commit money laundering, correct?

19 A. Yes.

20 Q. I want to discuss for a couple of minutes this afternoon  
21 a little bit more about the business of PCI. Is that okay?

22 A. Sure.

23 Q. You've studied it extensively, correct?

24 A. I have lived with it for a number of years now.

25 Q. You've been at it since 2008?



Kelley - cross

1 A. Correct.

2 Q. You've invested an enormous amount time trying to  
3 understand PCI and the scheme, correct?

4 A. Yes.

5 Q. And you have had various advisors along the way, such as  
6 PwC and several law firms to advise you, correct?

7 A. Correct.

8 Q. So let me ask some questions so that kind of we're all  
9 on the same page about PCI.

10 PCI was 100 percent owned by Petters, correct?

11 A. Yes.

12 Q. Petters was the sole shareholder of PCI, correct?

13 A. Yes.

14 Q. There were no other shareholders of PCI, correct?

15 A. Yes.

16 Q. Petters was also the sole director of PCI, right?

17 A. I think so.

18 Q. Is it fair to say, Mr. Kelley, that PCI was not just  
19 wholly owned by Petters, but was also controlled in all  
20 respect by Petters?

21 A. Yes.

22 Q. Is it fair to say that --

23 THE COURT REPORTER: (Sneezes.) Sorry.

24 THE COURT: Bless you.

25 MR. SPEHR: Let me try that one again.

1 THE COURT REPORTER: Sorry.

2 THE WITNESS: It's late.

3 (Laughter.)

4 BY MR. SPEHR:

5 Q. Is it fair to say that PCI was Petters, and Petters was  
6 PCI?

7 A. No. I wouldn't agree with that I don't think.

8 Q. Well, Petters was the decisionmaker, right?

9 A. Yes.

10 Q. He directed the action?

11 A. Yes.

12 Q. You don't have any basis to conclude that anybody at PCI  
13 did anything other than at the direction of Tom Petters?

14 A. I guess not.

15 Q. Coleman took direction from Petters?

16 A. Yes.

17 Q. White took direction from Petters?

18 A. Yes.

19 Q. Now, it's also the case that PCI was insolvent by no  
20 later than 1996, correct?

21 A. Yes.

22 Q. Is it also correct that PCI had no legitimate business  
23 operations by no later than 1996?

24 A. I don't know if that date is exactly precise, but it was  
25 very early on that --

Q. Mid-'90s. Okay?

A. Yeah.

Q. Fair?

A. That's fine.

Q. Okay.

THE COURT: Let's let the witness finish his response --

MR. SPEHR: I'm sorry. I thought he was finished.

THE COURT: -- and then you may question the witness.

BY MR. SPEHR:

Q. Fair that by the mid-'90s, PCI didn't have any legitimate business any longer, if it ever did?

A. Yes.

Q. And you haven't identified any legitimate business activity at any time for PCI, correct?

A. Correct.

Q. Is it also correct to say that PCI was a Ponzi scheme by no later than 1995?

A. I think that's fair. Yeah.

Q. And that was several years, was it not, before Petters opened an account at National City Bank in 1999, correct?

A. Yes.

Q. Is it also fair to say that Petters, Coleman, and White, at all relevant times, from the time the scheme began no

1 later than the mid-'90s to September of 2008, ran the Ponzi  
2 scheme? They were the -- they were the team leaders of the  
3 Ponzi scheme?

4 A. Correct.

5 Q. And all three served or are -- or in the case of  
6 Petters, are currently serving prison sentences, right?

7 A. Yes.

8 Q. And they are serving -- either they served or are  
9 serving in the case of Petters, prison services -- prison  
10 sentences -- I'm sorry -- in -- due to their role in the PCI  
11 Ponzi scheme?

12 A. Correct.

13 Q. So what we have here -- and you'll correct me if I  
14 misstate anything -- are four convicted parties; four  
15 parties convicted of executing the PCI Ponzi scheme.  
16 Petters was convicted of fraud, correct?

17 A. Yes.

18 Q. Coleman was convicted of fraud, correct?

19 A. Yes.

20 Q. White was convicted of fraud, correct?

21 A. Yes.

22 Q. And as we've discussed, PCI was convicted of fraud,  
23 correct?

24 A. Yes.

25 THE COURT: Counsel?

1 MR. SPEHR: Yes, Your Honor?

2 THE COURT: The hour has reached.

3 MR. SPEHR: Thank you so much.

4 THE COURT: You're welcome. We will resume  
5 tomorrow.

6 Members of the Jury, I will instruct you today  
7 that during this recess and every other recess, you must not  
8 discuss this case with anyone, including the other jurors,  
9 members of your family, people involved in the case or the  
10 trial, or anyone else, and do not allow anyone to discuss  
11 the case with you or within your hearing.

12 As you know, only you have been chosen to be  
13 jurors in this case and only you have sworn to uphold the  
14 law. And no one else has been chosen to do this important  
15 work. And you should not speak among yourselves about the  
16 case before you've heard all of the evidence and the case  
17 has been submitted to you by me for your deliberations  
18 because it may affect your final decision.

19 When I say you must not discuss this case with  
20 anyone, I also mean you must not e-mail, you must not text  
21 message, you must not blog or engage in any other written  
22 form of communication, oral form of communication, or  
23 electronic communication as I've instructed you before.

24 Also, do not read any newspaper or other written  
25 account or watch any televised account or listen to any

1 radio program about this trial or conduct any type of  
2 internet research or consult any other sources about the  
3 case, about the people involved in the case, or the general  
4 subject matter of this case.

5 As you know, you must keep an open mind free of  
6 outside information, and only in this way will you be able  
7 to decide the case fairly based solely on the testimony, the  
8 evidence presented in this courtroom, and the instructions  
9 on the law that I give you. And as you know, it would be a  
10 violation of your oath to base your decision on some  
11 reporter's view or opinion or upon other information you  
12 acquire outside the courtroom.

13 So it's very important that you follow these  
14 instructions. I know that you have been. I just remind you  
15 of the importance of you doing so and continuing to do so.  
16 We will resume tomorrow at the regular time. I hope you  
17 have a good evening. Thank you for your service.

18 **IN OPEN COURT**

19 **(JURY NOT PRESENT)**

20 THE COURT: And our witness is excused for now.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: And we'll see you tomorrow morning.

23 You're welcome.

24 And, Counsel, is there anything else we need to  
25 address before we recess?

1 MR. GLEESON: Yes.

2 THE COURT: Everyone in the courtroom may be  
3 seated.

4 MR. GLEESON: Judge, I just want to take two  
5 minutes to supplement the record of a motion you have before  
6 you sub judice to allow BMO Harris to elicit evidence of  
7 hedge fund complicity.

8 Two things bear mention at the outset. This is  
9 not a motion for a reconsideration. We understood your  
10 pretrial order. But this is based on what we consider to be  
11 a strikingly, like, abusive, unfair use of the order of  
12 preclusion, and it was exacerbated again today. And it's  
13 just based on the way this -- the prosecution of these civil  
14 claims have been conducted that have put us in just a -- a  
15 terrible position.

16 And here's how I want to supplement it. And this  
17 is all based on the examination this morning of Chris Flynn  
18 and the examination this afternoon of Mr. Kelley.

19 And, Judge, I'm just mentioning a couple of  
20 vignettes. There are a number of ways in which we believe  
21 this abusive use of the order of preclusion have reared its  
22 head. So I'm just going to mention a couple. I don't mean  
23 to waive my complaints with respect to others.

24 One I want to focus the Court's attention on as it  
25 considers our motion is the testimony about the transactions

1 lists that are referenced in the Deposit Account Agreements.  
2 And part of the questioning by Mr. Marder of Chris Flynn was  
3 the agreement -- the Deposit Account Agreement called for  
4 transactions lists to be provided by PCI to M&I Bank. And  
5 the questioning went along the lines of: You never received  
6 those transactions lists, did you? Did you make any  
7 assumptions as to why? Did you ever call PCI? The answer  
8 to that was he had no -- he didn't know why. He didn't know  
9 at the time that PCI was a billion dollars in the hole to  
10 the very investors who are the claimed victims in this case.

11 And the evidence we've been precluded -- the  
12 impression that was created was a false one that M&I failed  
13 to police the Deposit Account Agreements, therefore, harming  
14 the hedge funds who were the counter-parties with PCI to  
15 those Deposit Account Agreements.

16 The evidence we've been precluded from presenting  
17 shows that the transactions lists were never received  
18 because the Deposit Account Agreements were never intended  
19 to be implemented, never intended to protect the hedge  
20 funds. As I said, no one told Chris Flynn about the billion  
21 dollars that the -- PCI owed these hedge funds.

22 And together with the hedge funds, the -- PCI  
23 created these props, the Deposit Account Agreements, to keep  
24 the investors in the hedge funds at bay, to keep them from  
25 making capital calls. And they not only succeeded by using



1 the Deposit Account Agreements in that way, but they  
2 actually raised additional funds from those investors to put  
3 into PCI.

4 So the false impression was the hedge funds needed  
5 protection from PCI and M&I failed them. That is the  
6 indisputable inference that the trustee's counsel wants the  
7 jury to draw. The reality is PCI and the hedge funds were  
8 deceiving the hedge funds' investors, as I say, to fend off  
9 the capital calls.

10 The -- and, again, the hedge funds, throughout the  
11 day, have been presented by counsel for Mr. Kelley as  
12 innocent victims of M&I Bank and PCI. When, in fact, the  
13 evidence we're precluded from eliciting, but we should not  
14 continue to be precluded from eliciting, would show the  
15 hedge funds engaged in criminal behavior with PCI causing  
16 the losses to the hedge funds. And we respectfully submit  
17 that there probably isn't any reasonable juror who could  
18 conclude that PCI's inability to pay the hedge funds was  
19 caused by M&I Bank.

20 And then, this afternoon, we had a number of  
21 iterations of trying to maximize recovery to victims and  
22 creditors, returning proceeds to victims. The victims are  
23 participants in the scheme. We have the asymmetries, Judge,  
24 now being taken unfair advantage of. Investors were lied  
25 to -- excuse me, investors lied to Mr. Kelley, he testified

1 to, but not all of them, and not the investors whose losses  
2 he seeks M&I to have to pay for in this case. They didn't  
3 lie at all. They were part of the scheme. Some of them  
4 literally knew it was a Ponzi scheme and invested more in  
5 it.

6 The clawbacks, he's clawbacked -- he testified  
7 about clawing back funds from net winners. Well, we can't  
8 say, Well, how much? How many did you do that for? Have  
9 you accounted for those recoveries in the amount of damages  
10 you're seeking?

11 It's -- the asymmetries, Judge, are all over the  
12 lot. And it's not the Court's fault. I'm not complaining  
13 about your pretrial ruling. But your pretrial ruling  
14 referenced the fact that there could be unfair advantage  
15 taken of it; references depicting the hedge funds as  
16 innocent. They have been depicted as innocent victims all  
17 over the lot in this trial, and they are not.

18 So we ask you to consider the continuing, unfair  
19 advantage being taken by Mr. Kelley's counsel of your  
20 Court's ruling. And as I said yesterday, it's really hard  
21 to look around and find a door that was closed having been  
22 opened as wide as this one has in this case. Thank you.

23 MR. MARDER: Good afternoon, Your Honor. I'll  
24 address these two points separately. The points relating to  
25 the testimony of Mr. Flynn today are the exact same points

1 they unsuccessfully raised yesterday relating to the  
2 testimony of Mr. Jambor. And I'll try to avoid being  
3 repetitive, but you said in your order that -- on page 21 on  
4 the motion in limine, that you would allow us to inquire  
5 into the DACA agreements to the extent that those agreements  
6 were probative of the defendant's state of mind and to prove  
7 that they were a sham.

8 As I did with Mr. Jambor, my questions of  
9 Mr. Flynn were extremely limited. Those questions were  
10 directed to his knowledge and indicated that even though  
11 he -- even though he entered into these DACA agreements, he  
12 knew that they were a sham and knew that there was no  
13 transaction list and knew that the -- that he never complied  
14 with the agreement in any way.

15 So the notion that the purpose of this testimony  
16 was to say that they were supposed to keep from harming  
17 investors and that they failed the investors, that was not  
18 part of any of the examination of Mr. Flynn. I never once  
19 mentioned the fact that he had a duty to investors or that  
20 he failed investors or anything of that nature. Nothing of  
21 that extent occurred. All of the questioning was limited to  
22 ascertaining whether, in fact, because these were sham  
23 agreements, that this had something to do with a mental  
24 state.

25 So I'll move on, Your Honor, because I'm being

1 duplicative of the arguments we asserted yesterday. And  
2 I'll move on to Mr. Kelley. With respect to that testimony,  
3 Mr. Gleeson said that we were discussing how there were  
4 innocent victims. Those words never crossed the lips of the  
5 witness, nor did they cross the lips of Mr. Anthony, who was  
6 examining the witness.

7           Rather, Your Honor, the testimony related to three  
8 things that Mr. Gleeson has pointed out. The first one,  
9 Your Honor, is that the witness testified about the basis  
10 for damages. And that the basis for damages in this case  
11 was the amount of money that was owed to the investor. That  
12 is true. That's going to be in the jury instructions.  
13 That's the amount of money that's owed to the investors.  
14 That does not open the door to anything. No one is claiming  
15 whether investors were innocent or not. That's simply a  
16 fact that that is the measure of damages in this case and  
17 that was clearly articulated and accurately articulated.

18           The second thing that was raised was that there  
19 were these clawback actions. Again, Your Honor, this has  
20 absolutely nothing to do with investor complicity. What the  
21 witness described was that the trustee or the receiver was  
22 entitled to collect monies back from the investors who had  
23 received -- who are net winners. And that has nothing to do  
24 with the complicity or lack thereof of those investors. It  
25 simply indicates that he has the right and the obligation to

1 claw back money to any investors who receive more than they  
2 put in. So that has nothing to do with investor complicity.

3 The last thing that Mr. Gleeson mentioned was the  
4 issue of where the money was going. And it is true, and it  
5 is a truism that once these monies are paid by BMO, they are  
6 going to be distributed according to the bankruptcy plan.  
7 And that was the extent of the testimony as well.

8 So Mr. Kelley did not open the door to anything.  
9 There was never any discussion of, quote, innocent victims.  
10 There was discussion of clawbacks, which has nothing to do  
11 with innocent victims. There was discussion of the basis of  
12 damages, which is a truism, and the jury is going to be  
13 instructed on it. And there was a description of where the  
14 money is going under the distribution plan. So none of that  
15 has opened the door to anything to do with the -- with the  
16 knowledge of the investors, Your Honor.

17 THE COURT: This is how we will address this  
18 issue. I am not going to rule from the bench today. Both  
19 parties are to submit a brief of ten pages in length, if you  
20 are interested in doing so.

21 The briefing schedule will be that BMO's deadline  
22 is tomorrow at noon, plaintiff's deadline is Saturday at  
23 noon. Citations to the transcript to support your arguments  
24 are required. It will be a ten-page limit. We'll proceed  
25 tomorrow.

1 MR. MARDER: Thank you, Your Honor.

2 MR. GLEESON: Thank you.

3 THE COURT: All rise.

4 (Court adjourned at 5:16 p.m.)

5 \* \* \*

6 We, Lori A. Simpson and Erin D. Drost, certify that  
7 the foregoing is a correct transcript from the record of  
8 proceedings in the above-entitled matter.

9 Certified by: s/ Lori A. Simpson  
Lori A. Simpson, RMR, CRR

10 Certified by: s/ Erin D. Drost  
Erin D. Drost, RMR, CRR

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